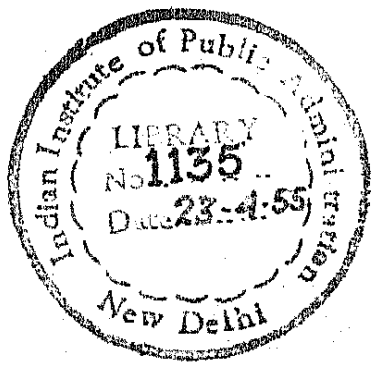
THE ADMINISTRATION OF THE LAW

by

The Right Hon.
SIR HENRY SLESSER, P.C.
LATE LORD JUSTICE OF APPEAL



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Printed in Great Britain by
Cheltenham Press Ltd.,
Cheltenham and London.

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PREFACE

BY

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THIS is the first volume in the Law Section of a series of educational books which cover all the main fields of knowledge. The series has been designed to meet in particular the needs of the reader who wishes or is compelled to study apart from tutorial assistance and the usual facilities of technical libraries. Law books for this class of reader must differ from the general run of student text-books in law which generally assume that the reader will have access to a 'law library' with its volumes of statutes and several series of law reports. The authors will be drawn from the ranks of law teachers, and in particular from the younger generation who have had in the Services experience of the needs of those who study a vocational subject such as law for its intrinsic interest and value as a social study as well as of those who have a professional training in prospect.

Of this first volume of the series—*The Administration of the Law*—a subject which finds the law teacher with little or no practical experience at a disadvantage—Sir Henry Slesser is the author. It is no small gain that this subject has been entrusted to one who was formerly first a Law Officer of the Crown and then a member of the Court of Appeal. In particular, from the long experience gained in that high judicial office after years of practice at the Bar, Sir Henry has given us in Chapter V his own view of the process by which a judge arrives at his decision. This, in itself, is a contribution which marks out this book from others which have attempted to describe the judicial machinery of the

country to readers with no previous acquaintance with law. Of special interest are the author's view on evidence and proof. It is no easy task to tell the story of how the courts function in a short book, much of which must necessarily be taken up by a description of the many courts which make their contribution to the administration of justice in England and Wales. Space has compelled the omission of any account of the courts which administer Scots Law—a system where procedure as well as substantive law reflect an origin so different from Common Law that not even two and a half centuries of legislation of a United Kingdom Parliament has attempted to produce a uniform system for the whole kingdom.

The Law, like much else in a changing world, has not escaped the notice of the reformer, but it is to be noted that, despite the several procedural reforms of the need for which lawyers have long been conscious, little serious change has as yet resulted from the war. Much of what has been done, as in the case of the Crown Proceedings Act, 1947, and the abolition of the doctrine of common employment, has been at the instigation of lawyers rather than from any popular clamour. Yet the elaborate and expensive procedure of our courts and the inadequate provisions for legal aid, without which the greater part of the population have long been denied in practice access to the higher courts, are clamant ills which there is ample reason for putting high on the list of overdue reforms. It is satisfactory to be able to record that the initial steps to remedy these defects in the machinery of justice have been taken ; the Report of the Committee over which Lord Rushcliffe presided on Legal Aid has been with the Government for two years. The appointment of this Committee was one of the two measures for reform of the law initiated by the Coalition Government ; the other was the appointment of the Committee on Company Law amendment and the major recommendations of the Committee have already passed into law. Moreover, there are sitting at the time of writing two Committees to enquire into the whole field of civil procedure both in the High Court and the County Courts with a view to simplification and reducing the complexities of litigation. It is enquiries like these which make

it so important for the layman to understand the present system and the reasons for it, in order to form his own opinion on the arguments for and against change.

Law is a social science, as well as a learned, or perhaps one should say, a technical profession. Indeed it would be no exaggeration to say that law is the social science without which none of the other social sciences could exist. Unlike economics which deals with but one, albeit a vital, aspect of the complexities of modern life, law embraces all fields of human conduct and indeed it is synonymous with the life of the community. The linking of the term—law and order—is familiar to all. The restoration of the rule of law in Europe was a principal objective of allied war policy. Freedom of the person and freedom of speech can only be maintained by the law restraining liberty from culminating in licence. Without a law defining conditions for arresting wrong-doers the police State at once emerges. In all communities means are required for compelling the fulfilment of agreements upon the faith of which commercial, industrial and to some extent domestic relations can alone exist. Nowadays it is essential to provide fully by law for the relationship between the State and its citizens. Just as in the past it was the lawyers who aided Parliament in resisting the claims of the Stuarts to arbitrary rule, so in the twentieth century it is vital to define in terms of law the balance between the individual and his Government which compels his allegiance and obedience to its manifold regulations and restraints, even if it offers him or her many benefits in return to a far more fulsome degree than it did three hundred years ago.

There was a time, when the study of law formed part of the instruction of all educated men. But higher education in those remote days was the preserve of the few who might hope to take part in ruling their fellow countrymen—and it excluded all women. In the eighteenth and early nineteenth centuries justices of the peace, to whom were entrusted most of local government as well as judicial tasks, were drawn from the ranks of the class who were so educated—crude and inadequate though their training may have been. It is

to-day all-important that the public should know how the law works, how it is developed, how it is administered. This first volume of the series is mainly concerned with the last-named aspect. But as its pages show, it is impossible not to go back, however cursorily, into the past and to look at the sources of our law, if an intelligible picture of the present is to be presented. It is hoped that the next volume will develop these sources in some detail. Law and its administration reflect in every age the social and economic life of the community. But the law is slow to change; its administration is entrusted to those who have attained maturity and it is a commonplace that law is apt to lag behind current requirements. The quicker the pace of change, the greater this danger. It is, therefore, particularly important that the general public should understand something of the way in which the law is administered and the reasons for a process which often strikes the layman as unnecessarily elaborate and dilatory. Only so can an instructed opinion be formed on how to improve and modernize our legal system.

The crucial question to-day is how a system which has grown up through centuries to protect the rights of individuals can be adapted to the requirements of an age when there is as much emphasis on the duties of the individual as a citizen as on his private rights. Can the courts which in theory have been perfected as instruments for safeguarding individual freedom fulfil the task of holding the balance between the individual and the public interest, as reflected by the obligations of the various organs of State to which are entrusted the administration of the public services, particularly those which control the free-play of private property and in general of private enterprise? These organs are entrusted by Parliament with wide discretionary powers. The administration of the law on the other hand, while not excluding discretion within defined boundaries, as in the acceptance of evidence and the degree of punishment meted out to a convicted person, presupposes that the parties have been able to foresee the consequences of their actions and therefore works best on fixed substantive rules. Is the

antithesis between law and public administration so great that the latter ought to function without the controlling hand of the courts? To put this in another way the courts have protected the old freedoms; can they continue to safeguard the new conception of liberty in the highly organized and complex administrative system of to-day? Few would advocate that all discretionary exercise of power should be reviewed by the courts. But the long history of our judicial system teaches the great merit in a free society of the impartial judge. Whenever there is a dispute which is soluble by a general rule it is important that the application of that rule shall be above suspicion. The tradition of our higher judiciary ensures this safeguard. It is a tradition upon which all adjudication should be based.

Sir Henry Slesser's contribution gives the reader the background in which the law is administered both in civil and criminal courts. It does not attempt to show the way to solve the problem to which reference has just been made. Rather is its purpose to give the lay reader some account of the working of the courts, and particularly the courts which administer the common law in its application to disputes between citizens, a background from which they can embark on a study of the substantive rules of law with a knowledge of how those rules are administered in our courts.

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March, 1948.

INTRODUCTION

THE purpose of this book is to describe to persons who are not, and possibly do not intend to become, lawyers, the outlines of the manner in which English Law, Civil and Criminal, is administered. The task is not an easy one ; our law is such a complex of custom, judicially made law and procedure, legislation and interpretation of previous decisions and statutes, with different courts in the past acting on diverse principles, that to attempt to understand it without regard to its historical origins and development is well-nigh impossible. In this particular treatise we are concerned only with that part of the Law which deals with its administration —it will be the function of later works to consider the actual law applicable to particular matters—the substantive law. Here "adjective law," as it is called, the law dealing with the constitution of courts, the reception of evidence, the method of proof, and the manner in which judges arrive at their decisions—is our principal concern. For this reason, specific legal problems will not be discussed, save so far as they have a procedural interest, but some legal history is inescapable ; without it much of our procedure must remain unintelligible, and although that aspect of law has been exhaustively explored by such great masters as Maitland, Pollock and Holdsworth, we must of necessity begin with an elementary account of it, confining ourselves so far as is possible, to that part which directly affects legal procedure.

We have to realize that the distinctive characteristics of English Law, perhaps of English ways of life generally, have developed slowly ; the early customs of the Anglo-Saxons are not very different from those of the other Teutonic peoples which were for long unaffected by the scientific influence of the great Roman legal system, nor can the moral influence of the Christian faith on Saxon law be ignored. As has often been pointed out, before that revelation vengeance for wrongs was considered not only unavoidable, but a positive obligation, God using the outraged man or

his tribe as an instrument of justice. Later, in the decision of guilt by Ordeal (by exposure to fire or water or by the Norman system of private battle), we find the same belief in a more limited form, that Providence has employed supernatural means to arrive at truth. The fact that slowly it became held necessary for a preliminary enquiry to be made through the presentation of a suspected culprit by his neighbours, and his clearing of the suspicion of guilt by testimony of his friends before the Ordeal was ordered, shows a developing care that this recourse to the supernatural is to be used with caution; in any case, early in the thirteenth century, the Church, which formerly had taken some part in the control of the procedure of the use of the Ordeal, by the Lateran Council forbade its use as superstitious, and from that time we find the law encouraging inquiries as to facts and juries taking the place of the more primitive determination of rights.

This is not to say that, for a long time, the rules relating to evidence were anything but very crude. In an age when there was little acceptance of uniformity of the processes of nature, and miracles and sudden interventions of the Deity were not regarded as unnatural, it would be absurd to expect that judges and juries would pay attention to that recognition of the uniformity of nature which Courts are now inclined to assume without further proof. The survival of trials for witchcraft well into the seventeenth century is an illustration of the persistence of this credulity.

The Romans, from whom, through the Normans, the logical element in English Law is principally derived, were earlier in their abandonment in legal matters of signs and wonders, though auguries and omens were long used by sceptical emperors to encourage their armies. The post-republican notion that the Roman people had transferred to their prince the full extent of their sovereignty enabled the later emperors to reduce their edicts to codes which found ultimate expression in those of *Justinian*, edited by jurists, though confirmed by the Emperor himself. The Code, the Pandects and the Institutes became the foundations of civil jurisprudence, all earlier Roman Law inconsistent with them being thereafter, for the most part, disregarded. Later

modifications were incorporated from time to time. The renewed study of jurisprudence in Europe in the twelfth and thirteenth centuries developed on the basis of the books of Justinian, but in England no such work of authority was recognized. While the continental system fell to be collected from authoritative writings, the English Law grew imperceptibly out of custom, judicial decision and precedent.

Here, however, as has been said, we are concerned only with legal administration and procedure, and in these matters have to note after the Conquest that gradual supersession of the old Saxon local Courts, the County and the Hundred, and to some extent the feudal manorial tribunal, by the King's Courts, exercising an increasing universal jurisdiction, a "common" law, throughout the realm.

In England, unlike the case of European feudal land holding, the Conqueror had insisted upon an oath of fealty directly from all tenants, whether holding through great Lords or not, and this centralization of allegiance did much to centralize law and justice. Thus the King's Court, the Curia (or Aula) Regis, was composed of those who held their land "per baroniam," that is as tenants directly of the King, though for a long time they possessed a limited and subordinate jurisdiction in their own Courts of the Manor. The process which has compelled the House of Lords in practice to delegate its judicial functions to trained lawyers; Bishops to their Chancellors, and Lords to their stewards, must have operated in the Curia Regis in a similar manner. It is inconceivable that illiterate fighting barons could possibly, without assistance, have adjudicated on matters of law.

When once the local Saxon customs were co-ordinated (albeit still respected) and government was in the hands of Normans, ignorant of them for the most part, some new system became necessary. To this need for trained minds may be ascribed the judicial reforms of Henry I and Henry II, separating the King's Councils for judicial purposes from their practical executive functions. Although many text books describe the history of the institution of the King's Courts, the reasons for the change have been but little explored. The above suggestion is advanced as one cause,

and to the need for skilled lawyers may be ascribed in part, the legal revolutions of Henry I and II and their further developments by Edward I. To this day the judges are summoned to sit with the Lords, to give advice on law, (their use in fact was last employed some fifty years ago, the Law Lords have superseded them in practice), but their presence supports the view that the Barons, as such, must always have been aware of their juridical incapacity.

Unlike the county judicial officers, the Sheriffs, the King's Judges, often at first clerics, were not free from the influence of Roman jurisprudence. Bracton, a judge of the King's Bench, and the first great exponent of the common law, writing in the thirteenth century, was undoubtedly learned in the civil and canon law, both of which came to be taught at the Universities at about the same time as the institution of the common law Inns of Court in London. Of Glanvill, Chief Justiciar in the time of Henry II, Maitland writes : "his treatise describes the practice of the Court over which he presided. There are very few sentences which we can trace to any Roman book, and yet in a sense the whole book is Roman." Whatever may have been the final influence of Roman law, there is little doubt that its effect was greatest in procedural matters and in the case of certain subjects such as wills and matrimonial causes, the whole practice developed on lines of the canonical church legal system.

Apart, however, from direct foreign influences, the Common Law became more scientific through the necessity, once the King's juristic authority was firmly established, for the suitor to obtain a writ appropriate to his case from officials in the Chancery, the writ-issuing department. The Writ, as used in legal proceedings, was, and still is, a royal command to the subject to answer a claim made against him and for a long time each class of action had its own peculiar one. By the time of Edward I, when law had already become technical and professional, and procedure had assumed an all important position, to obtain the right kind of writ was essential ; to follow precedent depended upon whether a similar kind of writ had already been issued, and to this day certain apparent injustices are without a remedy because

of early procedural deficiencies. The grievance arising from this limitation of the Register of Writs is found expressed by an early Statute which ordained that, "if in one case a writ is found and in like cases there is found none," the power to issue new writs, by analogy, may be extended to similar causes. Before this time, by the Provision of Oxford, 1258, the Chancellor had been temporarily restrained from this very sensible policy; it was an abortive attempt to restrict an increasing power exercised by his enlargement of forms of writs of action.

By the reign of Henry VI, nevertheless, the list of possible writs was almost complete and an increasing recourse was being made to the Chancellor in his "equitable" jurisdiction, that is, exercising the prerogative residuary power of the King, outside the common law, to give relief on Petition of an aggrieved person rather than that the suitor should be deprived of remedy for want of an appropriate writ.

As we shall learn hereafter, these archaisms have long been swept away and great elasticity in pleading and in obtaining a writ suitable to start proceedings for enforcing any actionable right now exists. The present facility dates from the Common Law Procedure Act, 1852, but at the beginning of the twentieth century it was still necessary in the Mayor's Court in the City of London to plead by old forms of stereotyped writ in "Debt," in "Covenant," in "Detinue," in "Trespass" and so on.* The form of action and the writ were so connected that, to this day, it is the habit of judges to keep on their desks an old pleading book, such as the first edition of Bullen and Leake, and ask themselves in doubtful cases what writ would have been appropriate under the old common law.

The procedure in Equity, which is now substantially similar to that at common law, has had a different history. As has been said, when the rules of common law became fixed, suitors began to ask the King in Council, through the Chancellor, for a remedy for justice denied to them, as they averred, on common law grounds. The complainant issued a Bill asking for relief, not a writ, and the defendant pleaded under the royal command known as a "Subpoena". In the fifteenth century, when the relations between equity and the

*See chapter x

common law had become very strained, the equitable Chancery Court endeavoured sometimes even to restrain a man under penalty from bringing his action at common law; the common law judges, on the other hand, contended that there was never any case for recourse to equity when there was a relief to be granted in their courts. There was at the same time an internecine dispute proceeding between the respective powers and functions of the King's Bench, Common Pleas and Exchequer Courts, all of the Common Law; fictions were devised to enable suitors to appear in the Common Pleas by asserting that the action had commenced in Middlesex (when it had not), or in the Exchequer by alleging that a debt, otherwise cognizable in the King's Bench or Common Pleas, was liable to prevent the creditor, unless it were paid, from meeting his taxes, so that the Exchequer Court became directly concerned. Many of these unedifying disputes, it is feared, apart from a natural desire of every tribunal to assert its authority, arose from the consideration of fees to be gained by attracting proceedings. An earlier dispute in the time of Henry II between the ecclesiastical and lay courts nearly overthrew the monarchy.

The Chancery, which took over most of the equitable work from the Council in "matters of conscience", as the jurisdiction was called, was administered by the Chancellor and his subordinate, the Master of the Rolls. Early in the nineteenth century, Vice-Chancellors were appointed and the juridical functions of the Master of the Rolls became limited to an appellate jurisdiction of a general kind with the Lords Justices in the Court of Appeal. A Court of Appeal in Chancery was constituted in 1851; the provision for appeals in common law was later.

As to inferior civil courts, dealing with small claims and poor persons, the place of the old Saxon Sheriff's Court in civil matters was taken by local courts acting in small districts, called Courts of Request, to which may be added certain local Courts, as those of Salford, Bristol, Liverpool and Derby. The duties of many of these have now been transferred to the County Courts of limited local jurisdiction, which, since 1846, cover the whole country.

In the Criminal Law, of recent years there has been no reformation comparable with that which took place under the Judicature Act, 1873 in civil cases. The only amendment of importance in the constitution of courts was the institution of the Central Criminal Court in London in 1834. In criminal jurisdiction and procedure it resembles the assize courts of the Kings Bench Division; judges travelling on circuit, and in this book, generally, is so included without further distinction. The jurisdiction of the Quarter Sessions of magistrates in the counties, and of Recorders in certain boroughs has been greatly increased, conditionally in the counties on the Chairman and Vice-Chairman in most cases only to be appointed with the approval of the Lord Chancellor possessing, certain legal qualifications. Courts of Summary Jurisdiction, consisting for the most part of untrained and unlearned magistrates (except where a Stipendiary acts in large towns) now exercise the great bulk of criminal jurisdiction and may even, in certain cases, try the less serious type of indictable offences acting, as they always have done, without a jury. They are assisted upon points of law by a clerk, who, however, has no responsibility for their decisions. Of late a very dubious practice of sending down some judge or other person to enquire into the behaviour of justices in cases of alleged impropriety seems to have found favour with Home Secretaries.

As to criminal procedure, it was only in 1836 that the defendant was allowed counsel generally to act as his advocate and not till 1898 was the prisoner entitled to give evidence on his own behalf, under conditions later to be discussed.

The growing disinclination of private persons to prosecute has resulted in these duties increasingly being placed upon the police or government Departments and the institution of a Director of Public Prosecutions in the nineteenth century has accentuated the change from private to public initiation of proceedings.

Indictments, the written accusations of crime, which are required to bring the accused to trial before all courts other than those of summary jurisdiction, though described as long ago as the time of Charles II, as a "plain, brief and

certain narrative of an offence committed," became extremely complicated, and were not adequately simplified until the passing of the Indictments Act, 1915. The abolition of Grand Juries by an Act of 1933, the descendants of those formerly required to make enquiry as to suspected crimes in their area, is a change, some think, of doubtful benefit. In origin as constituted by the Assize of Clarendon (1166), the Grand Jury was an accusatory body, to present cases of murder, larceny and, later, forgery and arson. By the Vexatious Indictments Act, 1859, a private person was restricted in his right to prefer a charge and the Grand Jury had long since ceased to do so, so that, in fact, nearly all cases came to them from the justices or the coroner, by way of committal of a suspected person for trial. The Grand Jury were then to consider whether they should find a "true bill" and allow the case to proceed to a judge and jury for trial. It was a means of preventing a man being charged without *prima facie* case shown and a check on the justices who are prone to hesitate not to commit. Their abolition was advised by Royal Commission in 1912, but in 1925 an attempt to do this by a Criminal Justice Bill was defeated in the House of Commons. Nevertheless, in 1933, the Grand Juries were ended, save in a few exceptional cases, and their functions in effect transferred to the Judge of Assize or Chairman of Quarter Sessions. The provision for appeals in criminal matters is later considered.

The fact that the whole judiciary in England has been recruited from the Bar from the earliest times and that Parliament requires the qualification of a certain number of years standing for most judicial appointments has had a profound effect on the form and methods of English jurisprudence, markedly distinguishing it on this head from most continental systems. The late rapid growth of administrative bodies, exercising powers and functions not very different from judges in the application of legal principles under acts or statutory regulations has called the attention of jurists and others to the fact that these tribunals, often constituted of civil servants, are frequently without legal training. That respect for precedent, which is native to the judges from

years of experience as barristers, may be missing in such "administrative courts", if they may so be called, and their threatened extension to so many branches of national life and activity, it has been said, may menace the integrity of English legal processes in a manner unknown since the autocratic tribunals of the Tudors, in Council and Star Chamber.

Moreover, the judicial obligations with regard to the rejection of testimony not legal evidence are nowhere defined or necessarily applied, and it has been decided in the House of Lords that, although the affected party must have a right to present his case, this may be without personal advocacy, and in some cases a professional advocate is expressly forbidden. It is in fact a new "Loi Administratif"; though to some extent disguised under the powers of control which the King's Bench Division exercises over inferior authorities by special Orders, the direct successors of writs formerly issued by the judges on the authority of the royal power of prerogative. Even these controlling orders, of Certiorari or Prohibition, are, in some cases, in terms denied by acts of Parliament and the only appeal allowed may be to a Minister or to an appeal tribunal nominated by him.

It would not be possible for Courts to perform their duties of adjudication unless there existed persons competent to plead before them and to prepare the cases of the parties, so that their arguments may be presented to the best advantage. Even in Roman days, the advocate, though not called by that name, who presented a client's cause (in theory at any rate gratuitously) was distinguishable from the Procurator (proctor) or agent who gave to the advocate the material on which he could argue the case and, generally, look after the lay client's interest. In courts working on the principles of the canon and civil law, the term Advocate was formerly used, as in the ecclesiastical appeal Court of Arches. Proctors still continued at the Doctors' Commons (a special branch of the legal profession practising in probate, matrimonial and administrative matters), until they were absorbed in 1857 into the professions of Barrister and Solicitor respectively.

Barristers, persons admitted to their privileges by the Inns of Court (the two Temples, Gray's Inn and Lincoln's

Inn), are now required to pass certain examinations conducted by the Council of Legal Education (a body representing the four Inns) and to keep three years of terms—this, before the war, by eating certain dinners. They have the exclusive right of audience in the superior courts and the House of Lords, and at Quarter Sessions and Assizes. Solicitors may be heard in the County Courts, in the Bankruptcy Court and at Petty Sessions, where, in fact, they do most of the pleading.

Most important, as have been said, from the view of the administration of justice, nearly all judicial appointments are made from the Bar, generally from the rank of leading counsel known as King's Counsel, but not necessarily so; thus, before a lawyer ascends the Bench, he has had many years of experience in the handling of witnesses and the interpretation of law and practice, and should have acquired those qualities of a critical, dispassionate and logical cast which are commonly described as the attributes of the "legal mind".

Moreover, as a Bencher, a member of the governing body of his Inn, he has associated for many years with the leading persons of the Bench and Bar and a similar sense of responsibility for the honour and efficiency of the practice of the law has thus been encouraged both by judges and advocates; indeed, as Commissioners of Assize, Recorders, and Chairman of County Sessions, barristers are frequently called upon to perform judicial functions before they are actually appointed to the Bench. So also, as a rule, Judges in the Appellate Courts have generally served a term of years as Puisnes (ordinary judges of first instance). An exception is provided by Law Officers of the Crown (the Attorney and Solicitor General) who, if they take judicial office, generally proceed directly to the House of Lords as Lord Chancellor or as a Lord of Appeal, but they, by virtue of their office, have had exceptional experience, more particularly in the conduct of governmental and international problems. Few County Court Judges have so far been elevated to the High Court.

To return to the Bar, its history has been very fully described by Professor Holdsworth and others, and will

receive here only a very summary consideration. Advocates were early recognized as "apprentices to the law", corresponding to "Bachelors" at Universities. By the fifth Lateran Council, clerics were forbidden to act as advocates in secular courts and thereafter the work was done entirely by laymen. As early as the reign of Edward I, the Bar was becoming a close profession ; Judges were increasingly being chosen from them. Above the Apprentices were the Serjeants (Servientes) who had their own special Inn, Serjeants Inn, and it was from the ranks of Serjeants that the Judges were actually taken. If it were desired to make a Judge, if not qualified otherwise, he became a Serjeant first. The Serjeants, on being made judges, assumed a different set of robes, but retained the Serjeant's "coif" ; they were referred to by the Judges as "brothers".

It was only, however, in the Court of Common Pleas that the Serjeants retained their monopoly as leaders. In the early seventeenth century, a new custom arose of adding King's Counsel to the Law Officers, who, in the sixteenth, had begun to represent the Crown in the Courts, thus ousting the special "King's Serjeant". The Law Officers, later, are found to be advising the Government, becoming part of it.

The other King's Counsel were not political appointments, and with the growth of parliamentary and cabinet government they ceased, except nominally, to be advocates of the King as such and became, what they now are, the senior members of the Bar. Called within the Bar, where, assuming a silk gown, they "lead" the juniors in court in much the same manner as did the Serjeants. The monopoly of audience of Serjeants in the Court of Common Pleas ended with the absorption of that Court into the High Court and, thereafter, no more Serjeants were created.

It is not easy to specify what qualities go to make an efficient barrister, competent to assist in the working of the court. From the outset he has two duties which must be reconciled, the one to his client, the other to the tribunal, and through the tribunal to the law as a whole. As regards the client, it is the right of the suitor to have every proper matter in his favour urged upon the court, on the other hand,

neither he nor his solicitor should ask counsel, nor can a junior ask his leader, to adduce evidence which the barrister in charge of the case thinks irrelevant or inappropriate, nor desire him to raise false issues of law or fact, nor attempt to confuse or mislead the court; and he must be prepared to sacrifice any client, professional or lay, who may through ignorance or perversity try to compel him to depart from his duty to the court. No exact code of professional ethics can be laid down, but the Bench soon learns to discriminate between advocates, and look for qualities of which integrity is by no means the least important. In the case of criminal cases, the obligations of counsel for the prosecution not to press for a conviction will hereafter be explained. It need hardly be said that these general observations apply with equal force to a solicitor when he is conducting or preparing a case.

As to argument on law, the object is to discover principle rather than mechanically to apply particular authorities to facts generally different from those before the Court. Over specialization of subject matter in argument, and the exclusive citation of cases derived from the practitioners' own particular class of work at the expense of general law are to be deprecated. The danger of concentration on one particular subject at the Bar is a very real and present one and injurious to the whole working of the judicial system. A barrister should be acquainted with the law, past and present, of his own and, if possible, of other countries and should be a man of wide education. May a retired Judge be allowed to add, particularly to lady advocates, that wit and a sense of humour are not always out of place; to be used, however, with caution.

The layman, who conceives himself to have been injured in law, will not, however, in the first instance consult counsel; indeed, professional etiquette will not allow him to do so, but will present himself for advice to the other branch of the legal profession. Solicitors (originally a Chancery designation but now, since the Judicature Acts 1873-5, a term which includes attornies-at-law who were formerly common lawyers, and proctors) unlike Counsel, have their status and responsibilities largely fixed by statute. By the Solicitors Acts, no

person may act as a solicitor or conduct any action, on behalf of another in any court in England or Wales unless he has been admitted, enrolled and otherwise qualified to act as a solicitor. He is an officer of the Supreme Court, and any person acting as a solicitor who is not one is guilty of contempt.

He must have been articled to a firm of solicitors and also pass certain examinations. The examination is under the control of the Law Society. He is actually admitted by the Master of the Rolls, who has certain powers with regard to the conduct of solicitors generally. The reason for this is that it was anciently regarded as a privilege granted by the Crown to allow a person to be represented by another in litigation, and also that the solicitors come into relation with the public in many ways which barristers do not, all of which require that they should be held worthy of general confidence. From disciplinary action which is taken by the Law Society before a statutory tribunal of practising solicitors appointed by the Master of the Rolls there is an appeal to the High Court; it is otherwise with Counsel, who, if they are disbarred or suspended by the Benches of their Inn, may appeal only to a private committee of the Judges.

With the many duties of solicitors unconnected with contentious business we are not here concerned, but, resuming consideration of a client approaching his solicitor, the solicitor, in his turn, may send the case to counsel for his Opinion, to be advised whether it would be wise to begin litigation or to defend a case. At all stages thereafter, the solicitor, more particularly if the case is a difficult one, besides retaining counsel to argue at the trial, may seek the benefit of his advice.

The remuneration of solicitors is largely fixed by statute or regulations made thereunder, but the fees of counsel (technically "honoraria", for which they cannot sue) are at large, and sometimes thought excessive, but the State has abstained from fixing any scale for the payment of counsel, though, of course, on taxation (review) of costs, the official Taxing Master will take the amount into consideration, to ascertain whether it is reasonable in all the circumstances of the case.

A solicitor is generally "retained" by his client to act for him, usually in writing; the retainer may be limited to a

particular matter and, unlike counsel, a solicitor may be held liable for negligence. He may sue for his fee under conditions laid down by statute.

Finally, before entering into the particular problems concerning the administration of justice, a few words may be added as to the sources of English law. Apart from the Common Law, the embodiment of age-long judicially interpreted custom, and Equity which has become as closely defined, we are dependent when seeking our law, on Acts of Parliament and, nowadays, also on regulations, rules, orders, and Orders in Council, made under and with the authority of such Acts or by the royal prerogative. In matters of civil procedure, most of the actual practice is to be found in Rules and Orders made by responsible judicial persons designated for that purpose by the Judicature and amending Acts. A similar code exists owing its authority to the acts dealing with County Courts. As to criminal procedure, the rules, as a whole, are to be sought rather in statute than in regulation; in particular the Justices of Petty Sessions are dependent upon the Summary Jurisdiction Acts, but even here much detailed procedure is to be found in rules as to fees, costs and so forth, made by the Lord Chancellor or the Home Secretary.

Unofficial works, the practice books in the case of the Supreme Court, and *Archbold Quarter Sessions* and *Stone's Justices Manual* for the guidance of magistrates, have set out and explained not only the statutes and rules governing procedure, but also the judicial interpretation of them. In the current edition of "Stone" there are to be found nearly 15,000 cases and nearly as many statutes! Civil procedure will exhibit a similar plethora of authority. Thus, for good or ill, practice in the Courts has become a most intricate and technical matter, requiring for its elucidation long experience and close study. Each year adds to the amount, if not weight, of authority, for no decision of a competent court which has not been overruled and duly reported, however ancient, can be said to be without authority, nor does statute law show any sign of diminution. Yet all men are assumed to know the law, even in its procedural aspects! To meet the elements of such latter requirement is the object of this little treatise.

CHAPTER I

COURTS OF CIVIL JURISDICTION

THE administration of justice in England is carried on, for the most part, by three classes of persons, Judges, Juries and Justices of the Peace. Before them, in appointed places called Courts of Law, evidence is adduced, arguments presented by the parties concerned or their advocates, facts ascertained, principles of law considered and, finally, judgment given. In most cases the law allows one or perhaps more appeals to higher tribunals, which appeals may take various forms; objections to the jurisdiction of the lower court, errors committed in the course of trial or complaint of unsupportable conclusions of law or of fact. All these matters will be separately considered hereafter, but at the outset it is sufficient to point out that Courts may primarily be divided, according to whether they administer civil or criminal justice, and according to whether they have a general jurisdiction within the realm over all persons and property, or are inferior tribunals, with limited powers of territorial adjudication, or amount of damages, punishment awardable or other limitations.

It is not every tribunal administering judicial or quasi-judicial functions which can be called a court of law; of late years, as is notorious, great powers of a semi-juridical kind have been entrusted to tribunals and other bodies set up by statute or by a Minister which lack all or some of the essential nature of a law court but which cannot to-day be ignored. Further, the forms of judgment delivered, damages, decrees or punishments and the means for executing the orders of courts must be reviewed and the expenses of litigation, the Costs, considered.

We may begin our enquiry by attempting the difficult distinction between civil and criminal process. Many of the problems which we shall hereafter have to discuss are common to both, but in a large number of instances, in procedure,

evidence and in the constitution of courts, there will emerge very material differences. What then is the fundamental difference between civil actions at law and criminal prosecutions?

It is interesting to note that in very early days the contrast was not nearly so clear as it is now. To-day many acts are illegal wrongs ("Torts," as they are called in law), which are not criminal, though there are still instances, such as Libel, Assault and Fraud, which may give rise either to civil or criminal proceedings. In Saxon times it was otherwise; thus in the collections of Kentish, West Saxon and English Kings we find (as in the laws of Ethelbert and Alfred) fixed fines for striking another, for murder, for theft and so forth—the remedy is both criminal and, in a sense, civil, for the payments are often to be made to the injured person, sometimes to the King. The prime purpose is to stop private revenge or a blood feud. In the case of contumacy, a man may be made an outlaw, in such a case his property may be pillaged or his person molested without redress; he is to be treated "like a wolf". If a man submits to jurisdiction he may, by paying the dead man's worth, which will vary according to his rank, even be excused homicide. It is only later that he has to pay with his life or the loss of limb. Imprisonment is comparatively rare.

By the time of Henry II, however, the effect of the study of Roman and Church (Canon) law were making themselves felt. Litigation about the ownership of land had become the subject of a special enquiry of a civil nature by means of an "assize", from whence developed trial by jury. The use of the "Inquest" in criminal cases, the machinery for investigating suspicions of crime by a system of grand juries not used in civil matters, accentuated the distinction. By the reign of Edward I, the Writ, issuing out of the Chancery, demanding the presence of the defendant if he wished to contest a civil case, had become altogether a different thing from the accusation based upon a criminal indictment of "Information". With these early distinctions, we may pass to the present position and endeavour to define the limits of civil and criminal causes.

In the statute setting up the Court of Appeal it is provided

that it shall not have jurisdiction to hear an appeal in any "criminal cause or matter". It has therefore become necessary, in the case of such appeals, to consider borderline cases, and in addition, for other reasons, jurists and textbook writers of authority have also sought to define the difference, but, as has been said, the task is not an easy one.

The great eighteenth-century commentator on English law, Blackstone, has defined a crime as "a violation of the public rights due to the whole community, considered as a community". It is a distinction which had long been made in Roman law, which called crimes "*Delicta Publica*". The consideration of the remedy applied may afford, perhaps, a more practical criterion, so that some are tempted to say that those acts are crimes which are treated by the law as such and prosecuted accordingly. Moral tests certainly often fail us in these days of multitudinous, and often unknown, regulations. Punishment, not damages by way of compensation, is the normal remedy for crime, and the proceedings are begun as a rule by the Crown or its agents, and alone the Crown may grant a pardon.

In civil matters, it may generally be said that the Crown, though it may be a party, is not so directly concerned as in the case of criminal proceedings. Perhaps the least unsatisfactory, if unambitious, definition of a crime may prove to be that it is "behaviour which is prohibited by a Criminal Code". In any case, in this book, when distinction is required to be drawn between particular civil and criminal administration, express reference will be made to the matter.

It is to be noted that the principal and most ancient in origin of English Courts, the present High Court of Justice, through its King's Bench Division, exercises both a civil and a criminal jurisdiction, besides controlling the powers of inferior tribunals. These matters can best be understood, like so many English institutions, historically, for many of the Courts which are now amalgamated in the High Court of Justice, had their origins far in the past and in some cases are older than Parliament itself, having existed long before any legislation gave to them specific powers and duties. Indeed to understand the High Court, without stressing

unduly antiquarian considerations, it is at least necessary to go back to Plantagenet times. It must be emphasized that these considerations apply primarily to the High Court, in many ways the most important of our civil tribunals; the County Courts, which administer civil justice only in limited areas and with limited jurisdiction, are the creatures of nineteenth-century legislation.

Although great lords in Saxon times brought actions and disputes before the Witan, the King in Council, it may be noted that, even after the Norman Conquest, this body continued in being as late as the eleventh century, by which time, under Norman influence, it came to be known as the Curia Regis, a name which has ever since been preserved in the style of the "King's Bench".

This Curia Regis, however, should not be considered primarily as a court of law; it was attended by the tenants in chief who held their land directly from the Crown and was also assisted by such officials as the Kings might summon. Generally it followed far more the constitution of the Duke of Normandy than the council of the old Saxon Kings. By the time of Henry I, its functions in executive government and in judicial work began to separate. The "Exchequer", with its work as a judicial court dealing with the King's revenue had its own "Barons", though these were generally justices of the Curia as well, the Chancellor being entitled to be present in both courts. In the reign of Henry II, a great legal reformer, two priests and three laymen were specifically appointed as Justices. By Magna Carta it was decreed that they should no longer follow the King's Court but sit "permanently in one place", in practice, Westminster —this Court held pleas between the King's subjects, "the Court of Common Pleas," while the King's Bench, which did not dissociate itself so fully from the King's Council till the time of Edward I, was still a part of the royal retinue. Bracton assumes that the King's suits will be determined in the Curia Regis. Not until the reign of Henry V did the King's Bench become a true court of law, the King no longer claiming the right to sit, though James I still hankered after this ancient attribute of monarchy.

Thus we see the development of three courts of common law, the King's Bench, the Court of Common Pleas and the Court of Exchequer, this last still being in a sense administrative, concerned with revenue, as well as judicial. Its rolls were kept by the Treasurer and it retained, and still retains, as a part of the King's Bench Division, its control and recommendation of appointment by the King of the Sheriffs—only in this last capacity did and does the Chancellor of the Exchequer still preside at their selection. For the rest, since the reign of Edward I, there was a Chief Baron who continued to preside until his office was merged in that of the Lord Chief Justice of England as a consequence of the amalgamation of the three courts of common law brought about by the Judicature Act of 1873. By this time, by the use of legal fictions and by express enactment, each of them was performing more or less the same common law functions, though, to the end, the Court of Exchequer retained control of revenue matters and the King's Bench a general supervision over inferior tribunals, both civil and criminal.

As to the judges in these courts, we have to note that the rise of the Chancellor was at the expense of the older office of Justiciar. The former minister was at first secretarial rather than executive or judicial in function, but, as the Lord Courts separated off from the Council, the Chancellor, who issued the writs which determined the form of action in his Chancery, came to sit not only in the Curia Regis on its juridical side, but also, as stated, in the Exchequer. He even acted as an ordinary justice when occasion required. As to these ordinary judges (puisnes), after 1326 all were laymen. By Henry II, with others, they were appointed to hold provincial assizes both criminal and civil. They attended Parliament to advise the House of Lords, for in those days no Lords, other than some Bishops, as such, were trained in judicial work. They were appointed from among the senior barristers, in particular in the Common Pleas from the Serjeants at Law, who pleaded before them. They were never, as on the continent, a special State profession. It was no doubt for this reason, from their training as advocates, that from the earliest times a particular insistence was laid

by the court on the correctness of the form of action employed, that is the writ selected to start the action, an error in which would often cause the failure of the plaintiff at the outset. The early reports, known as the Year Books, are largely concerned with the discussion of this problem of procedure, often at the expense of the real merits underlying the action. Such an insistence on correctitude of the forms of suit is characteristic of litigation in its more primitive stages (consider the abolition at Rome in B.C. 100 of the cumbrous "*Legis Actiones*" for the less formal "*Lex aebutia*") and legal reform was for many years concerned to correct this over-insistence on the technicalities of juridical process.

The appointment of the Judges of the High Court lay, and still lies, with the King, by letters patent under the Great Seal, in the case of Judges other than the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division and Lords Justices on the recommendation of the Lord Chancellor; the higher ranks on that of the Prime Minister.

Since the time of William III they are removable only on a resolution of both Houses of Parliament and hold office during "good behaviour" and not "at pleasure", and so, to all practical purposes, have a security of tenure and independence irrespective of governmental influence. In return it is a convention of the constitution that they will take no part in political matters.

These considerations apply equally to the Judges who have been assigned (they may now be "directed") into the other two divisions of the High Court, the Chancery and Probate, Admiralty and Divorce divisions. After 1880 the King's Bench, Common Pleas and Exchequer courts, of which we have spoken, were amalgamated to form the Queen's (now King's) Bench Division of the then newly created High Court of Justice; the juridical allocation of divisions thus constituted has remained substantially unchanged to the present day.

Besides the trial of major causes before a single judge of the King's Bench Division, sitting either with or without

a jury as the case may be, the King's Bench Division, as a Divisional Court of two or more Justices, continues to exercise a control over the proceedings of inferior courts and persons, through a power derived from the old Court of King's Bench, known as "Prerogative Writ". The first in constitutional importance is the writ of "Habeas Corpus"—it is directed to any gaoler or other person who detains someone in custody and calls upon him to show lawful cause why he should continue to imprison the complainant. He is to "submit to whatever the Court may think right". It is issued on an affidavit of the facts, and there exists a discretion in the Court to refuse it in inappropriate cases. Statutes of Charles II and George III now regulate the matter and by an Act of Queen Victoria, the Writ, which at common law ran in all dominions of the Crown, is now excluded from the Dominions and from any colony where there is a lawfully established court competent to grant it.

The writ (now order) of "Certiorari" commands judges or officers of inferior courts, a term which nowadays includes most administrative tribunals, to return the proceedings to the King's Bench in order to test whether the lower court has jurisdiction, or on the ground that for special reasons the inferior tribunal cannot effectually try the case. Some statutes specially prohibit the use of the writ and in any case, it will not be issued as a matter of right. The test has been laid down that it applies where the lower court "is less capable than the High Court of rendering complete and effectual justice". It may also be used in criminal cases. By a Statute of 1938 the writs of "Mandamus," "Prohibition" and "Certiorari" are no longer issuable by the High Court and Orders to the same effect are substituted. The purpose is to shorten the proceedings by no longer requiring a "return" to the writ itself.

Another prerogative writ is that of "Prohibition", also granted on affidavit ; it commands an inferior court to cease hearing the cause before them on the ground that the matter is beyond its jurisdiction. "Quo Warranto", now rarely used and replaced by an injunction, called on any person holding office to show by what authority he claimed to act.

Finally, and to-day still in full vigour under the modified form of an order of the court, comes the writ of "Mandamus"; it commands not only any inferior courts but also any person or corporation to carry out his lawful duty of a public nature; it has been used for very many purposes; to compel the holding of a court, to compel a local authority to affix its seal or to proceed to an election, and, in the case of a court, to hear and determine a case before them. It is not, however, usually available against a minister or civil servant when it can be shown that his duty lies in legal theory to the Crown alone, and not to the public.

It is not always easy to decide whether to utilize the above writs or to proceed by way of ordinary appeal. Generally, an appeal assumes that the court below had jurisdiction but committed some error; drew a wrong inference of law or fact or admitted as evidence what was not admissible. Where the jurisdiction itself is challenged the Prerogative Writ is the correct remedy.

Next as to "Circuits." As Commissioners of Assize, the Judges of the High Court (in practice of the King's Bench Division) and other specially appointed commissioners travel the country, exercising out of London essentially the same jurisdiction which they would have, "*Nisi Prius*" (that is as before sent on circuit), as single judges to try civil cases, free the gaols and hear and determine criminal causes. These assizes, by commissions of "Assize," "Gaol delivery" and "Oyer and terminer" (to hear and determine), date from the time of Henry I in criminal matters and Henry II in civil causes. The procedure in the former is substantially the same as in the High Court or Central Criminal Court in London. Of late the judges and commissioners of assize have also dealt with certain divorce matters as have the judges of the Divorce Court travelling circuits, as Commissioners of the High Court, for that purpose.

We have yet to consider the two other divisions of the High Court derived from Courts other than those of the Common Law. Of these the Chancery demands first attention. Like the Courts of Common Law, the Chancery also de-

veloped from the King's Council as a branch of the prerogative power whereby the King through the Chancellor could grant legal (or as is said "equitable") relief in cases where the Chancellor's common law writs proved inadequate to deal with the justice of the case. To amplify strict law with equitable doctrine was not confined to English jurisprudence; it was employed in the ancient Roman system. As the limitation of remedy by fixed writs (even with the extension of writs to cases similar, but not analogous to those actually covered), grew increasingly technical and inelastic, the demand for relief, by way of "Complaint," "Petition" or "Bill" rather than by writ, became conspicuous. The Chancellor went so far as to restrain a litigant from bringing his action at common law in certain cases and, by the fifteenth century, the relations between the two systems of law had become very strained. Although originally it was intended that the Court of Equity should act upon the ecclesiastical assumption that there lay a moral right behind law, a natural law of justice, which in the words of the great judge, Coke, would provide "extraordinary remedies," in fact the equitable jurisdiction became as formal and rigid as that of the common law, perhaps more so. Nevertheless equity did enlarge the ambit of legal remedy; thus estates came to be treated in appropriate cases, more particularly in the case of land as being held "in trust" (in legal ownership by one for the benefit of another), and later, the same doctrine for the protection of those intended to be benefited came to be applied to other forms of property, the legal owner being regarded merely a trustee, ensuring that the actual enjoyment of the property lay with another who for one reason or another could not be the owner in law. The device was used to secure a succession of life interests in property. Married women in particular, whose legal estate would pass to their husbands on marriage before the passing in the last century of the Married Women's Property Acts, gained from the recognition of equitable settlements for their protection.

In the matter of procedure, the Chancery Court, unlike the common law, relied principally on written sworn evidence,

known as Affidavit, and often it became necessary in the course of a suit in equity to transfer it temporarily to a common law court in order that facts might be ascertained by oral evidence and examination, which tended to increase the delay and expense in determining the action. Then again, as to remedies, the Court of Chancery proceeded for the most part by Injunction restraining wrongful acts; by order for Specific Performance, as in the handing over of land; by order of an Account, and only latterly employed the remedy of Damages, which was the normal means whereby a common law court corrected a wrong, whether caused by breach of contract or by injury.

All this, however, is now chiefly of historical interest, for in 1873, by the Judicature Act, not only were the Courts reorganized into one High Court of Justice, with appropriate Common Law and Chancery divisions, but, generally speaking, the remedies which each court had given the suitor could be used by all of them. Certain matters which had previously been determined in the Chancery Court were now assigned to that division, and other special causes such as Company Law and the law relating to Patents, but in many cases the plaintiff can choose in which division he will begin his proceedings, with this qualification, that if he desires a jury he must proceed in the King's Bench Division, for in the old Chancery Court and in the Chancery Division, juries were, and are, practically unknown.

Finally, we have to note the last of the three divisions, that dealing with Probate, Divorce and Admiralty, which also came to form part of the High Court of Justice after 1873. Of these the greatest business lies in the matrimonial subdivision. Until 1857 this was a class of litigation conducted in the Ecclesiastical Courts—in that year a Divorce Court was founded by statute with the Judge of Probate and a special judge, the others being the Lord Chancellor, the Chief Justices and the senior judges of each division. Under the new Act, save for new grounds given by statute, the proceedings were based rather upon the old canon law than on the common law of England. Probate also, which was an ecclesiastical matter until 1857, was given a new court with

the judge who acted in the Divorce Court. The interpretation of Wills still remained in part of the Chancery Court, but grants of probate and administration were now the duty of the Probate Court, as formerly of the Ecclesiastical.

The Probate, Divorce and Admiralty division has therefore had a curious history; as regards divorce, the Divorce Court, which has already been mentioned, took over the jurisdiction of the ecclesiastical courts in dealing with matrimonial relations. In earlier days divorce did not amount to much more than what is now called judicial separation, that is it did not permit remarriage, which right could only be obtained by a private Act of Parliament. Since 1857, on a conditional rule of the Court, called a decree nisi being made absolute, the parties cease in law for all purposes to be husband and wife and can remarry if they so wish. The grounds on which a decree can be obtained have been enlarged and the number of judges assigned to deal with this class of work has consequently been very much increased.

As to Probate, this also was an ecclesiastical matter, the judge in Probate, as we have stated, was in 1857 also made the judge ordinary in Divorce, so that when the whole structure was reorganized in 1873 as a division of the High Court of Justice, it was not unnatural that Divorce and Probate should be joined into one division. The third constituent, however, the Admiralty had had a very different history. Unlike the other two, which still look back to the canon law, the Admiralty law is international, but not canonical in nature; it is founded on the Civil Law and Law of Nations rather than the Common Law of England, for ships are no respecters of frontiers. One branch of admiralty jurisdiction, the Law Merchant, also of international inception, was transferred in the eighteenth century to the body of the common law and the admiralty jurisdiction is now confined to matters on the High Seas or nigh thereunto.

Since 1873, little change has been made in the constitution of the High Court of Justice; it still consists of the three

divisions above-mentioned. We may pass to consider the inferior courts which deal exclusively with civil matters, having only a limited jurisdiction as to the amounts claimed and the damages and other remedies which they can give and with jurisdiction only within a defined local area—the County Courts.

These are comparatively recent in origin. Apart from a few special local courts, in London, Liverpool, Bristol and other places, before 1846 there had been for many years no effective local tribunals to deal with small civil cases; a real hardship to the poor litigant who had to wait the assizes or begin his suit in London. In that year the country was divided into county court districts, to each of which was assigned a court. There are now fifty-six county court judges, in addition to the Mayor's and City of London Court. They were originally intended to enable small debts easily to be recovered, but gradually their jurisdiction has been increased, until to-day, subject to the limitations of amount and area, they can exercise very many of the powers of the High Court and proceed to administer justice upon the same principles. Their procedure in dealing with claims and defences and generally what is called pleading—the determination of the issues between the parties—is simpler in design. One further important difference is to be noted—the reasons for the decisions of the County Court Judges are "without authority", that is they are not reported and are not binding upon other judges of their own rank and are not a part of the general body of law as laid down by the judgments of higher tribunals. Nevertheless, the great majority of civil cases are brought before them and they occupy an increasingly important place in English judicial administration. Appointed by the Lord Chancellor, unlike the judges of the Supreme Court of Judicature they are not irremovable save by resolution of the Houses of Parliament (the Lord Chancellor may remove them for inability or misbehaviour and they must retire at the age of seventy-two), nor are they constitutional advisers to the House of Lords in matters of law. Deputies may be appointed by the Judge with the approval of the Lord Chancellor, or by the Chancellor himself.

Appeals from the High Court of Justice and from the

County Courts are now heard by the Court of Appeal. In the former case the appeal is said to be by way of "rehearing," that is to say the Court has power to review evidence and fact as well as law, while, in the case of the County Court, the appeal lies only on points of law and the findings of the judge or jury on fact are final. The Court of Appeal itself (which together with the High Court forms the Supreme Court of Judicature) is a recent creation ; it dates from 1873, and was brought into being by the same statute which constituted the High Court. Before that time, appeal lay from the three courts of Common Law to the Court of Exchequer Chamber, which consisted of judges other than those of the division from whom the appeal was brought and, on the Chancery side, until 1873, there existed a Court of Appeal in Chancery, created in 1851. These two appeal courts, together with a concurrent appellate jurisdiction from the Admiralty, Probate and Divorce Division, are all now amalgamated in the Court of Appeal, a tribunal consisting of the Master of the Rolls and a number of Lords Justices. The Lord Chancellor, the Lord Chief Justice and the President of the Admiralty, etc., Division are *ex officio* members, and Law Lords and retired Lords Justices may sit at the request of the Lord Chancellor. From this Court, with the leave of the Court or of the House of Lords, there lies a final appeal to the House—in form—to the "High Court of Parliament," an appeal which is, in fact, heard by special life peers created for the purpose, together with such other Lords as have held or hold high judicial Office.

To summarise then, we have to recognize the following tribunals competent in England in the first instance to hear civil matters.

1. The High Court of Justice in its three divisions, from whence there lies appeal to the Court of Appeal and finally to the House of Lords.

2. The County Courts, of limited jurisdiction with appeal (limited to points of law) as aforesaid.

3. A very limited civil jurisdiction entrusted to the Justices of Petty Sessions, such as under the Employers and Workmen's Acts, the Small Tenements Recovery Acts and other statutes.

4. A special ancient jurisdiction, territorially limited in London (The Mayor's and City of London Court), in Liverpool (The Court of Passage), Manchester (The Salford Hundred Court), the Bristol Tolzey Court, and the Palatine Court of Lancaster (a chancery jurisdiction).

CHAPTER II

CIVIL PROCEDURE

THE constitution of the civil courts having been considered, we may now turn attention to the proceedings which can be brought before them and the manner in which actions are conducted. These matters are, for the most part, controlled by regulations known as Orders and Rules of Court made under the Judicature Acts by a "Rules Committee"; they are substantially similar in the two divisions of the High Court, other than the Admiralty, Probate and Divorce division, which has its own particular rules. In the case of the County Courts, there are also special, and on the whole, simpler provisions than in the case of the King's Bench and Chancery divisions; there is a special rule committee consisting of five judges of the County Court, a barrister, a solicitor and a registrar, all appointed by the Lord Chancellor. In all these tribunals the underlying preliminary purpose is the same, namely to have the issues between the parties defined as clearly as possible before the actual trial begins. The process is known generally as pleading. Since 1875 most proceedings in the High Court (other than a special class of business instituted by Petition or Originating Summons) are started by a "Writ of Summons"; this was always the initiating act in a common law court, but formerly proceedings in Chancery were begun by "Bill of Information" or "Petition"; in the Court of Admiralty by a cause in rem or in personam (a distinction hereafter explained); in the Court of Probate by Citation and in the Court of Divorce and Matrimonial causes by Petition—all with different obligations and procedure. It was thus a great simplification when a simple writ (or petition in certain cases in the Admiralty and in Chancery Divisions) took the place of these varying devices.

The Writ of Summons commands the defendants in the name of the Sovereign to appear in court. This document

must be served on him and he can obey it by stating that he defends in person or by his solicitor. If for some reason he wishes to dispute the jurisdiction of the court, his appearance, if any, will be made conditional. The writ is witnessed by the Lord Chancellor, as issuing in the name of the King, it must contain the names of the parties in the action and be indorsed with the nature of the claim made. Formerly, as we have seen, this was a matter of extreme nicety, but now it is no longer necessary to set out the precise ground of action, though it should be as accurate as possible. The officials of the court will issue it, on receiving the necessary fees, as a matter of course, but the defendant can always take the point that it discloses no cause of action or is otherwise defective or objectionable. Certain specific claims for land and demands for money and on a trust may be "specially indorsed" on the writ, and in such case no further statement of claim, which normally follows appearance to the writ, is necessary and the way is clear for the "defence", unless pleadings are expressly declared to be unnecessary. When the defendant is out of England, special leave is necessary to "serve" him and when it is required to join several causes of action on one writ, leave of the Master (a subordinate judicial officer having responsibility for most procedural matters before trial) may be necessary. Next, normally, the writ must be "served" on the defendant, by showing him the original and leaving a copy or, more usually, through his solicitor who may "accept" service. This he or his solicitor does by "entering an appearance", if he wishes to contest the action. Unless the defendant enters appearance "under protest", by appearing he submits to the jurisdiction of the court, but if he wishes he need not appear and then the case proceeds as on "default of appearance". The plaintiff will then be entitled to final or interlocutory judgment according to the nature of the claim made. In claims for an injunction and certain other Chancery remedies the plaintiff must deliver a "Statement of Claim", despite the absence of the defendant, and in many cases the damages have still to be assessed.

Save in the case of a writ "specially indorsed" (when the

next ordinary process is a Summons before the Master for summary judgment, a claim which can then be opposed), the normal procedure which follows the acceptance of service is an application to the Master for "Directions" how to proceed. The Master can make an order as to the conduct of the case up to judgment. He may, in certain minor cases, remit the action to be tried in the County Court. If the directions prove not to be sufficient, either party can apply for further directions, but apart from a summons taken out by the defendant to dismiss the action, the Master may order Pleadings, the defendant needing an order to deliver a defence within a certain time after the plaintiff's Statement of Claim. In cases of specially indorsed writs, he may give leave, unconditionally or conditionally, to defend. When the parties are agreed as to the questions of fact to be decided, the Master may, with their consent, order the case to proceed without pleadings. The Master may also order particulars to be given either when he orders pleadings or thereafter and when necessary, accounts ; he will fix the place of trial and in some cases decide whether there shall be a jury, also the time of trial may be expedited. Commissions may be issued for the taking of evidence of persons abroad or ill, and generally he may deal with similar "interlocutory" matters. In the "commercial list", the Judge gives the directions and, in any case, there is an appeal from the Master to the Judge sitting in Chambers, that is not in open court. The interlocutory proceedings in Chancery differ in some degree from those in the King's Bench Division. There the preliminary matters come before Masters in Chancery who, unlike King's Bench Masters, may be solicitors.

In the Chancery Division, proceedings start either with a writ of summons, as in the King's Bench Division, though the writ is assigned by the plaintiff to a particular judge, or by what is known as an "Originating Summons". This latter device is used by trustees and creditors or persons concerned in the administration of estates generally to determine questions affecting beneficiaries or creditors, the taking of accounts and payment of monies into court, the control of executors and trustees and the determination of any question

arising in the administration of a trust; the summons is served on the parties interested and supported by evidence, usually in the first place by affidavit. Proceedings may also start by Petition, Summons or Motion, when the evidence is conducted by affidavit and not by oral testimony.

In the old Chancery procedure the plaintiff used to anticipate the defence in advance, and so lengthy arguments appeared in the pleadings, but to-day, apart from differences usually appearing in the relief claimed, the general rules governing pleading are the same in the King's Bench and Chancery Divisions. They are as follows: To deal with the Statement of Claim first, generally speaking, the defendant must know what it is that the plaintiff claims, so that he may answer the matters relied upon. In early days pleadings were oral, but by the reign of Edward IV the practice of entering the issues on the record had come into use and to-day it is provided by Order that "every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies", but not the evidence by which they may be proved. The defendant, as we shall see when we come to consider his position, may dispute each allegation in the claim, this is called a "Traverse", or he may admit some of them and ask the Court to draw a different inference from the plaintiff, this is "Confession and Avoidance". The defendant may rely on some point of law which, if statutory, must be specially pleaded as a rule, or he may counterclaim, but first he is entitled to know clearly what case he has to meet. Facts and not law must be pleaded by the Plaintiff, the material facts which must be pleaded are those generally necessary to establish a cause of action, and not other facts of the evidence. Matters affecting the amount of damages should be pleaded and, while particulars should be given so as to establish certainty, they should, as the rules provide, be pleaded in a summary manner. If not sufficient, a demand may be made to the Master for further and better particulars.

As to the Defence, the defendant may traverse, confess and avoid, or raise a point of law in reply to the same allegation. Formerly, in the case of an action against the

Crown, known as a "Petition of Right", special procedure was provided, but now by the Crown Proceedings Act, 1947, substantially the Crown sues and is sued in the name of a Minister like a subject. Generally speaking every fact not denied must be taken to be admitted. No denial need be addressed to damages and if the defendant, in his turn, wishes to make a claim against the plaintiff, he must do so specifically by "Counter-claim" or "Set off", the latter being limited to cases of one debt against the other. Otherwise, if the defendant's claim is in the nature of a cross-action, he can raise it by counter-claim, in which case the plaintiff will meet it by means of a defensive plea known as a "Reply", which he may also need to answer in confession and avoidance. At this point, subject to the rare further pleading of "Rejoinder", the issue between the parties will be joined and the case proceed to trial.

If the defendant fails to deliver his defence within the time prescribed in the directions, the plaintiff, if the case be one for debt or "liquidated" damages, that is damages ascertained, may enter judgment. If the claim be for damages not yet determined or for goods, he can only obtain an "Interlocutory Judgment", and then the assessment must be referred to a Master or an Official Referee, another subordinate judicial officer, entrusted with the task of taking accounts. The older method of going to a sheriff's jury on a "Writ of Inquiry" is now seldom used. Or, again, the defendant may have paid money into court which the plaintiff may take out in satisfaction of his claim, or he may refuse and continue to fight the action. In the end the problem of costs may be affected by whether the plaintiff does or does not recover more than the sum paid into court.

We pass now to the collection of evidence before trial necessary to establish the case. Frequently this is done on the advice of Counsel, which is called "Advice on evidence" in which he states what evidence, written or oral, may be necessary to support the plaintiff's claim or controvert that which the defendant is likely to establish. Where documents are to be relied upon by either side, the normal course is to apply to the Master for an order directing the other party

to disclose on oath all documents which are or have been in his possession or control relating to any matter in question in the action. The "Discovery of documents", as it is called, will be confined to such documents as are necessary, in the opinion of the Master, to dispose fairly of the action or save cost. The party who has been so ordered to make discovery of documents may state that he objects to produce all or some on the ground that they are "privileged"; these are cited in a separate part of a schedule from those he is willing to produce. He also states in a second schedule those documents which were in his possession but now are not. Documents which *only* support his *own* case need not be produced, nor documents between him and his solicitor, nor those prepared for purposes of litigation, nor those which would tend to incriminate him, nor those which belong to a third person and also those whose discovery would be contrary to public interest. Formerly, in proceedings against the Crown, discovery would not in any event be ordered. Public interest may still be relied upon as a ground for refusing certain discovery. Copies may be allowed to be taken by the party obtaining discovery and, generally, the Master can order the production of documents after argument. In such a way it is provided that when the parties come to trial all material documents, not privileged, shall be before the Court. This method of discovery of documents was formerly restricted to the Chancery, but is now used throughout the High Court in all its divisions. Not only documents, but factual matters otherwise orally provable may also be disclosed before the hearing by means of another form of discovery known as "Interrogatories". These can only be administered with leave of the Master, but are permissible when they maintain the case of the party administering them or destroy the case of his adversary. Their use is discretionary, for as has been said, "they constitute a process which might become oppressive and be used for improper means". They must, of course, be relevant, they must not be limited to mere credibility, they are not to be used as a form of cross examination; subject to this, they may be wider in scope than the pleadings.

Interrogatories must be drafted with some art or they will

be disallowed. They can compel an adversary to disclose the facts on which he relies, but not the evidence by which he proposes to prove those facts, nor may they "fish" as is said, that is they must be limited to actual facts and not be used to create a case. In the King's Bench Division they are not to be used to discover the terms of documents, unless it is proved or conceded that they have been lost. The Chancery practice is less restricted. In his answer, which must be on oath, the defendant may object that the question is not within his knowledge, or it may be objected to on the ground that it is "unreasonable, scandalous or vexatious", all of which words have received, from time to time, judicial interpretation. If the answers be deemed by the interrogator insufficient, he may apply to the Master for "further and better answers".

The relief claimed in the Chancery and King's Bench Divisions is stated in the statement of claim and will vary according to the nature of the action, a matter discussed in later volumes of this series. Where damages are claimed, if liquidated, the sum actually demanded with sufficient particularity must be mentioned, otherwise the claim for damages will be in general terms. If the object be to restrain the defendant from repeating an unlawful act, a claim will be made for an "Injunction" which may be obtained by motion as an interim injunction until trial. If it be desired that a contract be ordered to be performed (and it is not all contracts that will be so ordered), a claim for "Specific Performance" may be made, so also there may be a claim made for an "Account", for the possession of land or goods, or merely for a "Declaration" as to legal rights. In Probate, where a will is contested, after a Caveat, restraining the parties from touching the estate before the Court has dealt with the matter, a writ will follow and Citation to become a party to the suit, addressed to the party who has accepted or refused probate or administration. Pleadings are then ordered contesting or affirming the Will. This procedure is known as "Solemn Form."

Next, to consider Divorce, the proceedings begin with a Petition setting out the marriage, the issue and the grounds

on which divorce is claimed. An affidavit, a sworn declaration, must accompany the petition. The petitioner then "extracts a citation" calling on the defendant to appear and answer the petition, and in default, warning him that a decree may be made in his absence. Damages may be claimed in appropriate cases and a co-respondent added to the suit. Many defences are open to the defendant, as condonation, connivance, collusion and other matters. Questions of domicile may fall to be determined. A special practice exists in divorce, in part founded upon Canon Law. The Registrar of the Court takes the place of the Master in the other two divisions. The granting of a decree nisi, and the intervention of the King's Proctor, to show cause why a decree should not be made absolute, are procedural incidents to be noted.

Finally, as regards the High Court, we have to examine the practice in Admiralty. The old rules in the Court of Admiralty as modified by the rules of the Supreme Court apply. In actions against the ship (in rem) following the writ of summons a "Warrant" is issued to the Marshal of the Court to arrest the ship and its cargo or freight until further order. The writ is fixed to the mast or cargo. The defendant may enter a caveat against arrest and may be ordered to give bail as a condition. If the defendant does not appear the Judge may decide for the plaintiff and order the ship to be sold or otherwise dealt with. Persons other than the parties can intervene and show their interest. In actions for damage by collision the parties file a sealed "preliminary act," stating the circumstances and this may be used as a statement of fact without pleadings by order of the Judge, but as a rule, pleadings, in the ordinary form, follow.

We pass to the case of the inferior courts exercising civil jurisdiction; the County Courts and the Petty Sessions. In the County Court actions are ordinarily limited to a claim not exceeding £200, or £100 in cases affecting rental of land, £500 where the cases could be brought in the Chancery Division. Action for libel, slander or breach of promise, can only be heard by agreement between the parties, though the High Court may transfer such matters to the County Court when raised on a counter claim. There also exist certain

general powers of remission from the High Court to the County Court and vice versa which may, however, affect the costs recoverable. The plaintiff must show a territorial qualification to come before the particular court. Generally the plaintiff may enter his "Plaint" (there is no writ or statement of claim), within the district in which the defendant dwells or carries on business or (with qualifications) where the cause of action arises. Subject to the limitations of amount litigated, actions may be transferred from the High Court to the County Court by the Master in appropriate cases. The defendant may give notice of defence, and a full defence, in certain cases, may now be pleaded. There is an equitable jurisdiction since 1865 and certain County Courts have a limited jurisdiction in Admiralty (though not in Divorce or Probate) and many statutory powers in other matters. Except in London, County Courts may have bankruptcy jurisdiction. The functions of the Master in the High Court are generally exercised in effect by a Registrar, who also has jurisdiction to deal with undefended cases. Solicitors as well as counsel have the right of audience.

As to Courts of Summary Jurisdiction, they also by statute have been given jurisdiction in certain civil matters. These, like cases in the County Court, are begun by complaint upon which a summons may issue which has to be served as in a criminal cause. Under the statute of 1838 dealing with small tenements, the justices have jurisdiction in ejectment in cases of tenancies not exceeding seven years or at a rental not exceeding twenty pounds and may grant the complainant possession. So also a dispute between employers and workmen may be heard civilly and sums may be ordered to be paid as wages or damages, while some domestic matters between spouses are now relegated to a special private hearing before the justices, known as the "Domestic Court". These orders, dealing with matrimonial matters, are applied for as in the case of other summary jurisdiction, but the application for a summons should be made out of court. The Domestic court consists of three justices and must, if possible, include a man and a woman. The court may deal with the enforcement of a separation or maintenance order, and may attempt

conciliation and deal with custody of children. The Justices in Petty Sessions, along with the High Court and County Courts, have, in the Juvenile Court, hereafter mentioned,* jurisdiction under the Adoption of Children Acts. The recovery of rates and the granting of liquor and some other licenses are also matters for them, of a quasi-judicial character.

The procedure so far explained until very recently did not apply to proceedings by and against the Crown. As regards civil cases where the Crown was plaintiff, the normal method was by an "information" exhibited by the Attorney-General. The "information of intrusion" for trespass on Crown lands and the "information of debt" for moneys due to the Crown; a claim to goods was brought by "information in rem". The defendant answered and thereupon the case proceeded in the ordinary way, except as has been said, there was no right of discovery in the subject and in addition the Crown could and can always refuse to disclose documents on the ground that it is contrary to the public interest. Unless there was a special statutory provision permitting it, the subject could not counter-claim, but the subject for some years has been able to recover costs which formerly the Crown neither gave nor received. The Crown could not be made a party to an "interpleader", the form of case when several parties are claiming property in the possession of another.

As to a claim against the Crown, this proceeded by "Petition of Right". The permission to sue the Crown was issued by the Home Secretary on the advice of the Attorney-General by "fiat". It could not be brought for injury (Tort), for no such action could be brought against the Crown, but it would lie for breaches of contract and for the recovery of possession by the Crown of land or chattels. A special set of rules regulated the proceedings. All this is now, fortunately, past history. Subject to certain exceptions, as in the case of the armed forces and the post office, the Crown is now put as litigant in much the same position as the subject.

The procedure of appeal from the High Court is by way

*See p. 95

of motion to the Court of Appeal for a new trial, or to set aside a verdict or judgment of the lower court. The hearing is in form "by way of rehearing", but in very few cases have the Court of Appeal used their power to hear witnesses, but it can, and does, order issues to be tried or accounts made and, generally, the Appeal Court can make such order as the justice of the case may require, as ordering a new trial to be confined to certain matters. Formerly appeals from County Courts went to a divisional Court of the High Court and thence, with leave, to the Court of Appeal, but now such appeals go directly to the Appeal Court, with this distinction, however, from High Court appeals, that the County Court appeal will only lie on a point of law and is not a rehearing, though a new trial may be ordered. Appeals from a Judge in chambers on appeal from a Master go to the Court of Appeal only with leave from the Judge or the Court of Appeal. Appeals in the High Court on revenue and other matters brought by "Case stated" are confined to questions of law. There are special provisions with regard to the appeals from the awards of arbitrators and certain local civil tribunals.

Appeals from final orders, except by consent, must be heard by not less than three judges of the Court of Appeal, but interlocutory matters may go before two. There are many grounds on which a new trial may be demanded, as that the judge misdirected the jury, wrongly admitted or rejected evidence, that the verdict was against the weight of the evidence or that there was none to go to the jury, that the jury misbehaved or that the damages were excessive or inadequate. Substantial wrong or miscarriage of justice must however be shown to obtain a new trial. There is no appeal as to costs unless some question of principle is involved. Nor is an appeal possible in any "criminal cause or matter". This last limitation, as has been said, involves a consideration of what constitutes a criminal cause and many cases decided thereon have been of considerable juridical importance.

To appeal to the House of Lords, the consent of the Court of Appeal or of the House itself is now necessary. By the Appellate Jurisdiction Act, 1876, it is provided that the appeal

shall lie by way of Petition (it lies also from the Scottish and Northern Ireland courts), to the effect that the case may be "reviewed by His Majesty the King in his Court of Parliament that the court may decide what of right, and according to the custom of this realm, ought to be done in the subject-matter thereof". Three Lords of Appeal at least must be present, that is the Lord Chancellor, the Lords of Appeal in ordinary and such Peers as hold or have held "high Judicial Office," i.e., as regards England, an ex-Chancellor, ex-Lord of Appeal or one who has held high judicial office and who is a peer. The Lords of Appeal are entitled to rank for life as Barons, holding office like Judges during good behaviour. They may sit and vote in the House of Lords. Contrary to the usual opinion all other peers are entitled to sit and vote on judicial matters, but such a proceeding has not been attempted for many years, though the decisions of the House judicially are given by "vote" like other determinations and the opinions of the Lords are "speeches" and not judgments. Since 1670 the Lords have conceded that they will not act as a Court of first instance, save when trying their fellow peers or on impeachments ; matters later to be discussed. The history of the appellate jurisdiction of the Lords is a confused one. The division of the Curia Regis, which has been mentioned, into the three common law courts, left a residuary jurisdiction in the King to be dealt with in Council, in the Chancery, and by the King in Parliament. This latter power however, was confined in time to matters, as it was said, in "Error", that is errors in law apparent on the face of the record for which a special writ lay before the institution of the present more comprehensive method of appeal. In such matters an intermediate appeal lay to the Court of Exchequer Chamber, composed of judges other than those of the Court from which the appeal was brought, and thence to the House of Lords. As long ago as the reign of Henry IV, the Commons had requested to be relieved of this judicial business and since then the Lords have exercised a jurisdiction which still, nominally, is vested in the High Court of Parliament as a whole, as the form of the proceedings testifies. The Lords did not take over appeals in equity until the time of Charles II,

and in that case the appeal was by Petition and not by "Writ of error" and this procedure is now universally applied to Common law and Chancery appeals alike.

The House of Lords, in its judicial capacity, like all tribunals, does not make law, it "declares" it, so that its decisions are binding not only on the Courts but upon itself. Their effect can only be modified by Act of Parliament. It is necessary, if it is desired to rely on a decision of the House, or indeed the Court of Appeal or the High Court, to ascertain what were the facts on which the law was declared and how much of the law pronounced was necessary to arrive at the judgment (the *ratio decidendi*), and how much was but observation of a particular Lord or Judge, not necessary or essential for the actual decision in the case. These latter observations (*obiter dicta*) are not binding, and, when more than one judge is sitting, as in the case of the Court of Appeal or the House, it is not always easy to decide what was the decision of the whole tribunal and how much is the opinion of a particular Lord or Judge.

Again, there are many causes which, for one reason or another, never reach the House of Lords or even the Court of Appeal and in such a case they may be treated as good law, binding on a court of equivalent jurisdiction. Years afterwards they may be directly or inferentially over-ruled, though there is a natural reluctance to upset well and long-established decisions unless they are patently erroneous.

Another uncertainty is provided by our system of reporting. Broadly speaking all decisions of moment in the House of Lords or Court of Appeal find publication in one at least of the many reports recognized by the Courts, but this is by no means so in the High Court and decisions on circuit are rarely reported at all. The printed "Book," prepared by the parties for use in the House of Lords may be of some help, but with the doubtful exception of the very early reports down to the reign of Henry VIII, called the Year Books, the whole of law reporting in England has rested upon a voluntary basis, though the books known as the "Law Reports" are now superintended by a council on which the Bar and solicitors have representatives.

The Judges in England declared the law long before legislation in the form of Acts of Parliament existed ; it was then, for the most part, a pronouncement on procedure or as to general customs of the realm. Appeals to precedent appear in the Year Books as early as the time of Edward II and, finally, we find Blackstone in the eighteenth century saying "It is an established rule to abide by former precedent—it is not in the breast of any subsequent judge to alter or aver according to his private sentiments"—the extent of the application of this doctrine is discussed later.

Thus, on counsel giving an "opinion", whether to proceed, to appeal, or to defend, he in his turn, will examine not only all the facts, but also all the precedents in law. If he is wise, conscientious and competent he will not merely read digests, textbooks and summaries of cases, known as "head notes", but will consider all relevant matter to find what actual principles emerge which are material to his case. If he does not do this, it is to be hoped that, at the trial or on appeal, the Judge will do it for him.

Finally, in civil procedure, we may remember that the sole right of audience before the Supreme Court and in the House of Lords, save for the litigant himself, is vested in members of the Bar. They, in their turn, being "instructed" by a solicitor who acquires the facts from his client and prepares "Proofs" for counsel of what the witnesses are expected to (but often do not) say and of all relevant documents and other material. Thus each branch of the profession is dependent upon the other. They meet, with or without the lay client, in "Conference", or where a King's Counsel is employed as well as a "Junior", in "Consultation". In County Courts, Petty Sessions and Bankruptcy Courts, the solicitors, as has been said, have a right of audience and need not employ counsel.

By the sixteenth century the "Attornies", admitted by the Courts themselves—they are still officers of the Court—and not by the "Inns of Court" (the colleges for barristers), were no longer admitted to the Inns and the custom grew up that the Bar might not "accept briefs" from lay clients. King's Counsel were added to the Law Officers in the early

seventeenth century, but soon they ceased to advise the Crown (still the duty of the Attorney and Solicitor-general) but until recently they needed a special license to appear against the Crown. Normally each King's Counsel must have a junior to appear with him in Courts. As to attornies, they are now amalgamated with the Chancery "Solicitors" in one profession and are known by the latter name. Most non-contentious business is done by them, sometimes with advice of counsel, and they have a direct contact with their lay client which barristers by custom are forbidden.

The pleadings being closed and issue joined, the next stage for the plaintiff is to give Notice of Trial, though, if he delay unreasonably to do so, the defendant may take the initiative. The case is then placed in the "Cause list" (there is a special one for "Short causes" to be heard speedily), and in due course the case will come on for hearing. In the King's Bench Division, the form and conduct of the trial will be influenced largely by the presence or absence of a jury. Until the middle of the Victorian age, nearly every case requiring the ascertainment of facts was so tried, but now, even in the King's Bench Division, a trial is very frequently by Judge alone ; indeed the right to a jury is now restricted to a very few subjects, of which defamation, libel and slander and breach of promise of marriage are perhaps the most prominent. Otherwise, the trial will be by a judge without jury, unless an order be made at chambers for one. The fact of a jury being ordered, which in any case will not be done if the case involves the prolonged examination of documents or accounts, may raise fear of local prejudice which is a ground, if a fair trial cannot take place in a particular place, for altering the "Venue", the place of trial. If a jury is ordered, either party may ask for a "Special Jury"—persons of a property qualification taken from a special panel, but these may shortly be abolished. Otherwise a panel of persons taken from the jurors' book of persons, liable as householders to serve is made out by the Sheriff and from the panel, twelve of either sex are drawn who may be challenged by either party, either to the whole panel or to individual jurors, but such challenges are now very rare.

If the defendant does not appear, the plaintiff will prove so much of his claim as is necessary and obtain judgment. If the defendant alone appears, he is entitled to have the action dismissed. Within six days, however, either absent party may apply to have the judgment set aside for sufficient reasons.

We may pass to the normal case where both parties are present ; the junior counsel for the plaintiff, if there be two, when there is a jury, opens the pleadings, that is, states the issues and thereupon as a rule the plaintiff begins his case. It may be, however, that the defendant has made such admissions as will entitle him to begin. In substance the matter will be decided according to where the "burden of proof" first lies, that is to say the question which party would be entitled to judgment if no evidence at all were given.

Counsel, if they are wise, will not open too strongly, for they never know what will emerge in the course of the trial ; in any case the opener should not state what he is unable to attempt to prove. Witnesses are then called to state their evidence "in chief". They must not be "led", i.e., told what they are expected to answer, but first they must be "sworn", as the jury have already been, or given the opportunity to affirm. Objection to questions or answers must be taken at once ; a fact may not be considered relevant to the case or it may be sought to prove a fact in a manner not permitted by the laws of testimony, in any case the Judge will rule on the matter.

Unless the witness called prove hostile, he must not be attacked as to his character without the permission of the Judge. He may refresh his memory by a memorandum made about the time of the occurrence of which he is speaking.

Next follows the "Cross-examination" by the adverse party, here character and credit may be impugned and the opponent's case should be put to him to deal with it if it contradicts the witness's evidence. He may, however, refuse to answer a question which tends to incriminate him. Spouses are protected from disclosing conversation between them, and legal advisers and government officials are protected, the latter from disclosing State secrets.

The re-examination may only be conducted to clear up what has been said in cross-examination. The Judge may also ask a witness questions which he may deem relevant, but cannot himself call witnesses without consent of the parties.

The necessary documents to prove the plaintiff's case will be "put in" and, following the general law of evidence, a copy will not suffice unless the loss of the original can be established. A witness may be served with an order, called a "*subpoena duces tecum*"; he may also be summoned like any other witness by Subpoena to give oral evidence. If the document has been destroyed or cannot be found other evidence of its contents may be admissible in certain cases.

At the end of the plaintiff's case the defendant may submit that there is no case to answer either in law or for want of sufficient proof. If the case is ordered to proceed (and with a jury the Judge generally orders it to do so), the defendant opens his case and either calls witnesses or puts in documents. The process of examination is conducted as in the case of the plaintiff or vice versa and then he addresses the jury, the plaintiff replying, or, if he calls no evidence, the plaintiff sums up and the defendant has the last word. Although these matters may be important with a jury—though many think the value of the last word is exaggerated, since in any case the Judge has it in his summing up—when there is no jury, it can make little difference to a Judge in which order the submissions are made.

The manner in which judges direct juries cannot be adequately defined, though the Court of Appeal has often had to decide what constitutes "misdirection". Some judges content themselves with briefly explaining the issues and commenting on the evidence, others are more explanatory and even reveal their own opinion. Moreover, the nature of the summing up may vary with each particular case. Summing up is a peculiarly English procedure, it occurs as early as the fourteenth century; it has been said that a summing up should be not only accurate but adequate.

The Judge may ask the jury to return a "general verdict" or answer certain questions. In the case of specific questions

answered the Judge will have to decide the legal effect of the answers. Where damages are claimed, the jury under direction, will assess them. They have been classified as contemptuous, nominal, substantial and vindictive, according to whether the jury think the action was unnecessary, or that there was really no damage suffered or want to give the amount to compensate for injury actually suffered, or wish to give damage, only permissible in certain classes, to be in the nature of a penalty.

It is next necessary for the successful party on the verdict to ask for judgment; it may be that the Judge, as a matter of law, thinks that a plaintiff is not entitled to succeed, but as a rule judgment follows the verdict. The legal effect of the judgment is to produce the legal state known as Res Judicata or its equivalent. Here, when the plaintiff is suing substantially by virtue of the same alleged title or the issues raised in a subsequent action are the same as that on which judgment has been given, the court will stay the second action. Estoppel by Record is another way in which a judgment of a court of record may prevent the same litigation between the same parties being re-opened. For after judgment the cause of action merges in the judgment debt.

When a Judge sits without a jury, he is a judge of fact as well as of law. The effect on the conduct of the case often is to discourage irrelevancy and emotional appeal.

The costs will normally follow the event, the successful party having them awarded in his favour, but it remains for them, as the saying is, to be "taxed", and it is only the costs so limited by taxation which he will be entitled to recover from the other side. The duty of assessing them according to recognized principles is performed by special officers known as Taxing Masters. This was a Victorian provision, though the term "costs" appears as early as the time of Edward I, but, as a general rule, no costs were allowed the defendant until a statute of Henry VIII.

In the Chancery Court, before the Judicature Act, it was frequently the practice to send issues of fact to the common law courts, there to be decided by a jury, but now, although a jury is in fact practically never ordered, there is nothing

in the rules to prevent one being summoned. In practice, however, all questions of fact are invariably decided by the Judge. Where the proceedings start by petition, summons or motion, the evidence is given by affidavit and not by oral evidence, but the general rules as to evidence, to be discussed hereafter, apply. The affidavits are presented by each side in turn, and not until the evidence is completed does the Court adjudicate. In actions started by writ, the evidence is adduced as in the King's Bench Division. As relief other than damages or the surrender of a chattel is often involved, taking the form of accounts, trust administrations and other fiduciary matters, the working out is usually referred to the Chancery Masters, and judgment often postponed until the report is complete. The administration of estates, the winding up and, generally, the affairs of limited companies, the dealing with trusts and real estate, patent matters and the wardship of infants and many other questions demand special procedure, adjudication and administration. Many of the causes in Chancery, such as those of trusts, are of an administrative rather than a compensatory nature. The granting of injunctions, interlocutory and final, is more particularly the work of the Chancery Division and, on the whole, the Chancery practice, both from its history and present functions, has developed in a manner distinguishable from that in the common law, notwithstanding their assimilation in the High Court. Different counsel as a rule practice in the two divisions, though there is nothing to prevent a barrister appearing in any division of the High Court.

As to Probate, to make an effectual will, the testator must be of sound mind so as to understand the effect of what he is doing, he must realize what property is in his disposition and he must be free of "undue influence". These are matters to be determined in a Probate action ; the meaning of a Will is for the determination of the Chancery Division.

The powers of the Divorce Court, apart from its making a decree, include the authority to order alimony and a jury may be summoned. In Admiralty the Court may be assisted by Trinity Masters as assessors, and Assessors may sit in Admiralty appeals, both in the Court of Appeal and in the House of Lords.

Juries may be had in County Courts and there the Judge himself, without appeal, may order a new trial on grounds which would justify the higher courts in granting it. The Chancery and Admiralty jurisdiction, where it exists, is limited, like the Common Law jurisdiction, in amount, but generally the procedure resembles that of the superior tribunals. Certain powers as to married women, infants, lunatics, friendly societies, agricultural holdings, rivers pollution and other matters have been expressly conferred upon the County Court Judges, and the Stannaries Court jurisdiction in Cornwall has been entrusted to the Court in that county.

The limitation in time of causes of action which varies according to the subject matter was, in 1939, the subject of a consolidating Act, the Limitation Act. Broadly speaking, actions founded on simple contract or tort must be brought within six years of the time from which the cause of action arose; action on a deed or judgment within twelve years, and there are special provisions with regard to mortgages and the recovery of land. In the case of a public authority action must be brought against them within one year. Its general effect may be to deprive a litigant of his cause of action if he has permitted too long a period to elapse between the coming into existence of his right and the commencement of proceedings. Certain statutes such as the Trade Union Acts and the Gaming Acts limit the power of Courts in any event to grant some or all relief.

CHAPTER III

EVIDENCE AND PROOF

IN this chapter it is proposed to consider what testimony may be adduced in actions and what presumptions of fact or law may properly be made in the course of a hearing. "It was in the sixteenth and seventeenth centuries," says Professor Holdsworth, "that the Jury definitely assumed its modern function as the judge of facts on the evidence placed before it in Court." "It follows," he points out, "that rules as to its admissibility are a comparatively late feature." The rules began in mediaeval times as affecting documents, but with oral evidence, when juries no longer decided matters of their own knowledge, it became important to control its admissibility. Judicial notice of facts, presumptions and estoppels as means to decision are of earlier date than rules regulating evidence. In the Council and the Chancery, oral witnesses appeared more often on subpoena—a means to enforce attendance soon copied in the Common Law; a statute of Elizabeth expressly deals with the matter. The takings of opinions from experts, not unknown in the fourteenth century, was recognized as an existing practice in the sixteenth. The objection to Hearsay is found expressed by Chief Justice Holt in 1696, though objection had been taken, as may be read in the State Trials, more than a hundred years earlier. From this time, also, comes the rule that documentary evidence cannot be varied as a rule by oral. The development in the eighteenth century, though rapid, did not much alter principles established in the preceding one. The contributions of Lords Hardwicke and Mansfield, for the most part, were by way of reinstatement and clarification. But the increasing interest of lawyers in the matter is shown by the fact that treatises on evidence begin to appear: Nelson's Digest in 1717, followed by Gilbert in 1754.

General principles of reasoning, prevailing at different periods, have undoubtedly influenced Courts in accepting or

rejecting classes of evidence. The cogency of an alleged fact will be differently assessed in an age credulous and unacquainted with the uniformity of natural law in a time when the judge and jury, in the experience of their daily lives, have become used to the operations of machinery and other products of a scientific age. The inferences of fact which they will draw and the presumptions upon which they will act, will be very different from those of their mediaeval predecessors. Even before juries learned to rely upon proved evidence, the judge was expected to act only upon matters proved before him. Not until 1816 was it held to be ground for a new trial that the jury had come to a conclusion of their private knowledge.

Reasonable probability becomes the criterion of valid proof: more is not demanded. In criminal matters the test is put negatively; juries are told to be satisfied of the guilt of the prisoner, and so of the evidential links which lead to such a conclusion, "beyond reasonable doubt". Legal proof, circumstantial or direct, it is conceded, cannot hope to amount to absolute demonstration. Such a limited degree of proof has long since been regarded as sufficient to "find a fact" or to return a verdict. But how are such probabilities to be weighed? Juries are not logicians; they depend upon "common sense", a quality very valuable in dealing with matters within their experience, but not so useful in assessing the unusual. Moreover, the method whereby they hear two conflicting forensic appeals in weighing evidence, both of which, unless the case be very clear, are normally put before them by the Judge in his summing-up, without his always expressing a decided preference for either story, can scarcely assist them. For the most part they are quite untrained in estimating evidence, and their almost universal inability or disinclination to take notes over a long period of trial is sometimes disconcerting.

Each jury, doubtless, proceeds in a different manner to its conclusions. According to the constitutional usage, their findings are not as a rule readily reviewed in a higher court, though, by a patent absurdity, a decision of a Judge (a person trained in juristic logic, and quite unaffected by any irre-

levancies of counsel), sitting alone and performing a jury's functions, may be reviewed by an appeal court. The matter is made the more indefensible in that such a power only exists in the case of the superior judges ; appeal does not lie from a County Court on a question of fact. So also in criminal matters, the Court of Criminal Appeal cannot review fact. Another peculiarity of legal practice is, that although the opinion of an expert may be supported by an account in court of experiments performed by him for the purpose of forming his opinion, the experimental method, so much employed by scientists and commended by inductive logic, finds little place in legal determination. Indeed, while the acceptability of the evidence is carefully determined by law, the proper use of it to found a conclusion when received is still left, apart from such directions or advice as a Judge may think fit to give, in an unformulated condition to the jury. What material is considered doubtful and what reasonable must depend on the education and psychological condition of each juryman.

It may be that considerations such as these have worked to assist the gradual removal from Courts of the assistance of juries altogether. Before the middle of the last century no question of fact could be determined otherwise, at common law, than by a jury. In Chancery, their assistance was not sought. Summary jurisdiction in crime has for long made the magistrates judges of fact ; only at Quarter Sessions and Assizes, and in a very limited number of civil actions, are juries still thought to be necessary.

The purpose of the adducement of evidence in legal proceedings is to provide data from which a decision may be reached as to matters in dispute. By a long series of decisions, mostly delivered in the late eighteenth or nineteenth centuries, a body of rules has been elucidated which has had the effect of excluding from legal consideration many elements which, outside a court, would be regarded as very relevant in coming to a conclusion of fact on a particular matter. Thus, statements made by a person not a witness are, generally, excluded ; this under the rather misleading description of "Hearsay". The exceptions to the rule—declarations

against interest (by a person not a witness, made in the course of business duty), certain statements by deceased persons, admissions by agents jointly interested with parties, and so forth—do not for the most part rest upon any defined logical principle, but rather upon the collected experience of tribunals regarding cases in which the declarations of persons deceased and other statements made by persons, not witnesses, may or may not be trusted.

Another important divergence between the popular and ancient reception of evidence and that now excluded in law lies in the province of character. In ordinary life, reputation is regarded as all-important ; in law, as a rule, it is excluded, save in cross-examination to discredit witnesses. In criminal causes, good character may be relevant and not bad, unless character is in direct issue as a fact ; in defamation, the reputation of the plaintiff may be important in mitigation of damages (though evidence of specific acts showing bad character are excluded), but, as a general rule, character is to be disregarded. The strict rules of courts as to documentary evidence are other examples of the divergence of legal and ordinary veridical standards. The exclusion of opinions, the staple of ordinary estimation of fact, save on matters of science and art by experts, is a further example of juridical discrimination.

Then again, in law, certain witnesses are incompetent on the ground of youth or mental infirmity. Spouses are generally not compellable witnesses in criminal cases. Judges, advocates, and legal advisers may receive the Court's protection. Not until the Oaths Act of 1838 could persons not professing the Christian or Jewish faiths be sworn. Only of recent years could a witness without religious belief be made competent by affirmation. All these subtleties are unknown to a world for the most part avid of uncritical gossip. Nevertheless, when all difference of treatment is acknowledged, the average jury, and even the average judge, continues, notwithstanding that he is in a law court, to form conclusions as to fact in the same manner as the layman. In the fourteenth century injunctions were sought in the Chancery to restrain the practice of witchcraft ; it is doubtful whether evidence to

support such a claim would receive very serious consideration to-day.

The deference paid to mathematical processes during the seventeenth and eighteenth centuries produced a great respect for that class of "necessary" truth dependent upon clarity of demonstration, and the assurance of eighteenth-century lawyers, such as Blackstone, illustrates this type of mind. "The Law," to quote Professor Pound, "was taken to be complete and self-sufficient, without antinomies and without gaps, wanting only arrangement, logical development of the implications of its several rules and conceptions, and systematic exposition of its several parts".

The reliance of the Law upon documents, amounting in some cases to a refusal to give effect to a transaction not evidenced by them, arises from the comparative certainty which writings afford. Even then their effect may be avoided, in certain instances, by evidence of misrepresentation, fraud, mistake, or absence of understanding by the signatories. When the fact to be decided is dependent upon oral evidence, conflicting statements must be expected in many cases. Sometimes, on the basis of burden of proof, it may not be necessary to decide the matter ; the failure of the side relying on the statement to satisfy the Court that it is true may have the effect of depriving him of evidence on which he relies without any definite conclusion as to its falsity being made against either contestant. In other cases, where the Court deems it necessary to come to a conclusion on the matter. other statements consistent or not consistent with that relied upon may be of moment. Events accepted as true may prove inconsistent with the words relied upon. Probabilities may have to be considered where there is no more ready test. The illustrations mentioned by Huxley of the alleged camel and unicorn in Piccadilly, compared with the assertion of the presence of a horse in that thoroughfare, afford instances of the degrees of probability. Motive, fallibility of honest recollection, the possibility of confusion or perjury, corroboration of other witnesses, the demeanour of the deponent and his character—all these are ingredients which may, with many other elements, induce a final acceptance or rejection of testimony.

Things, it has been said, cannot lie, but evidence of physical facts can very readily be given a false importance, or help to found a false inference. The ever-occurring instance of skid-marks in motor collisions is a good example of the dangers of uncritical reliance upon what has been called "real" evidence. In the end some fact will be accepted or not, but in most lawsuits there are many other facts to be determined, and it is the resultant of them all, balanced together or against one another, which constitutes the final factual finding. Then, again, the relative importance of facts so decided must depend upon what issues of law have to be determined—despite the superior standing of Appellate Courts, there is no work more critical or exacting then the ascertainment of relevant facts in Courts of First Instance.

At the end, a decided history of the case emerges ; the facts are said to have been "found", yet these juridical facts have sometimes subsequently been shown to be at variance, in greater or less degree, with actual occurrence. This is inevitable—reasonable probability does not exclude the possibility of its opposite ; the most that can be hoped is that, by scrupulous attention to all the matters I have mentioned, and to many more, and in the case of judges sitting alone, by long training in discrimination both as advocate and as judge, such errors will be reduced to the least possible number.

The marked tendency to remove causes from the uncertainties of decision by the jury must necessarily have the effect of making the assessment of evidence more scientific and responsible than it could hope to be when entrusted to the untrained instincts of laymen. In this connection, it is probable that the learning peculiarly associated with mental and moral processes in man and in society, psychology and sociological knowledge, will form a far greater part of the juridical equipment in the future than it has done in less scientific ages. Psychology is only now developing beyond the empiric stage, and the nature of the mind is still but too little known. Nevertheless, in the past twenty years great advances have been made in this study, although in the formulation of principles many absurd and exaggerated suggestions have

had to be discarded, but Judges are probably wise, having regard to the transitional state of the science, to treat its conclusions with caution. There is little doubt, however, that when it is more fully developed its contribution as an aid to the understanding of the motives and veracity of witnesses may be very great.

With these general observations, we pass to the consideration of the principles governing the law of evidence as it has emerged in part from principles of general logic, in part from decisions in particular cases. Of these the most fundamental is that of relevancy. In one sense all events in the world at all times may be said to have their influence on any other, but the law, proceeding from practical rather than philosophic considerations, has introduced the disqualification of remoteness in adducing evidence to prove a particular fact. The question whether a particular fact is too remote to be material is for the Judge when the question of rejection arises, but if admitted, it is not easy to say what fact may not influence a jury or even a judge in drawing inferences from acknowledged happenings ; but here we are dealing with the total rejection at the outset of the evidence tendered. Next, the evidence must be relevant to the issue in the case, and it is so when it is a part of the same transaction as that in debate—this is a matter of law rather than of inference of fact. Motives and subsequent behaviour may be relevant, so also statements made at the time of the act to be proved and facts which explain relevant matters. On the other hand, as a general rule, the manner in which a man behaved on an occasion other than that in issue in the case is not relevant in law, though in ordinary life it would be so regarded ; the exceptions are to show, where motive is in question, that something similar is done on another occasion, or that a matter was done in the usual course of business. In criminal matters there are other special provisions which will be considered hereafter. If the question is whether an act is accidental or not, acts showing a systematic behaviour, and, in cases of conspiracy once proved, the acts of other conspirators may be relevant.

We will examine next the difficult question of "Hearsay" ;

evidence derived from a statement orally or in writing by an absent person who cannot, therefore, be sworn or cross-examined. Such matters, which in law are normally excluded, in actual converse between men are held to be of value if the absent person and the relator of his remarks also have a reputation for veracity. Hearsay may include conduct as well as words. In the reign of Charles II an objection to hearsay evidence was made by Lord Chief Justice Jeffreys and he speaks as if the rule were already fixed, though an earlier study of the State Trials shows the evidence of an absent person to have been admitted in the reign of Elizabeth, and, the report continues, "there was much said to prove that the testimony of a man absent was sufficient, if it were proved to be his upon the oaths of others".

The cases where hearsay may be relevant include admissions made by the person against whom they are to be produced, or his agent, authorized directly or inferentially, but not in his favour. They may also be made against an interest of a party to the action by persons having an interest in the proceedings. The case of admission as to crimes (confessions) is later discussed, as is also the case of dying declarations as to the cause of death in homicide. Admissible declarations may be made in the course of business—made against interest. When a will has been lost, statements of the deceased testator as to its contents may be relevant or where the question of its genuineness arises. Statements as to public rights or customs may be relevant though otherwise hearsay, and, finally, evidence given in a previous action, when the witness is dead or mad or unable to attend through illness of a permanent kind may be permitted, though here a commission, the taking of evidence on oath by a formal document, might in some cases be sought. The absent person must have been liable to be cross-examined on the previous occasion and the issues the same or similar. The case of depositions in criminal cases is specially considered hereafter.

Certain statements in documents are relevant, such as the recitals of facts in Acts of Parliament or public proclamations or in official records ; a copy of an entry in a banker's book is *prima facie* evidence of the entry therein and its effect ;

this is by statute, though the banker need not produce his books without a Judge's order. Final judgments are conclusive proof as to the effect of their decrees and as to the legal position of the parties regarding facts directly in issue. By the Evidence Act, 1938, in civil proceedings such matters as entries by a tradesman in his books are admissible evidence as forming part of a continuous record, but the maker of the statement, if alive and not unfit, must be called. An earlier judgment may also be pleaded by what is called an "Estoppel by Record"; that the whole matters in issue are *res judicata*, i.e., have already been disposed of by final judgment of a court. This matter has already been mentioned when pleadings were being considered. Such foreign judgments as can be enforced in the realm can also be proved within the limitations above stated.

Opinions, save those of experts, are usually irrelevant; an exception is the case whether persons living together were assumed in the opinion of neighbours and others to be married. The question of opinion as to character arises usually in criminal prosecutions and is therefore postponed until we deal with them.

The *proof* of facts is to be distinguished from the admissibility of evidence about them. In some instances facts prove themselves directly without further evidence, as in the case of the Court taking judicial notice of English law, Acts of Parliament, statutory orders signed by Ministers or Judges and other matters prescribed by statute or custom. The ordinary meaning of words is also a matter of judicial acceptance and a special meaning if relied upon must be proved. In civil actions, matters admitted in the course of the proceedings, by the pleadings or otherwise, call for no further proof.

The evidence of the contents of documents must be proved by what has been called primary or best evidence, that is the production of the document itself; it is only when it is proved to have been destroyed or lost or where the inscription, as on a stone, cannot be produced in court for physical reasons that secondary evidence, such as copies or oral evidence as to the contents will be admitted. Some

documents need by law to be witnessed and the witness, if alive or procurable, must be called or his attestation proved if he cannot be produced. In such a case, if secondary evidence of the document being witnessed is permitted, the attesting witness need not be called nor where he denies all knowledge of the attestation. In such a case execution may be proved in another way. Certain documents may be proved by certified copies or by other methods allowed by law. A document will primarily be presumed to have been made on the date which appears on it and to have been duly sealed; if over thirty years old it will be presumed to have been signed by the person whose signature appears on it.

When a matter has been reduced to writing, no evidence can be given orally to contradict or vary it, unless it is proved to have been obtained by fraud or duress or some improper means, where, for want of capacity or intention, it was not validly executed. Oral evidence rescinding an agreement in writing, and a separate oral agreement attaching a condition precedent to the document's obligations may be received in evidence. In certain cases it is required by Parliament that a contract shall be in writing, as in cases falling under the Statute of Frauds, 1677, and the Sale of Goods Act, 1893, and some documents are required to be under seal.

Oral evidence as to the meaning of a document may be given where the words are not normally intelligible or are ambiguous in their ordinary meaning.

The technicalities of the reception of evidence are, of course, subordinate to the main object of its production, which is the establishment of necessary proof. As has already been stated the burden of proof lies on the party against whom judgment would be given if there were no countervailing evidence, but, in the course of the action presumptions may arise which will shift the onus on to the other side, the proof of each fact, whoever avers it, being on the party wishing to satisfy the Court of its existence.

Some presumptions are conclusive, as that a child cannot commit a crime if under eight years of age, or that a sane person intends the natural consequences of his acts; others are good until contradicted, as that a person born during the

marriage of his mother and a man is legitimate. Such a presumption may be negatived by proof of impossibility of access and in other ways. Another example of presumption is that after seven years absence from those who would normally have had information, the absent person is dead, rebuttable if it can be shown that the persons relied upon would not normally have so heard from the absent one, or again, that persons in possession of property are lawfully entitled to it, an obviously contestable case.

Next we must consider what are called "Estoppels in Pais" which arise when, by acting in a particular manner a person causes another to believe a state of affairs to be true and to act on that belief; in such a case the representer may be prevented or "estopped", from denying the facts which he has so intended or permitted to be believed; a most usual case is that of a tenant paying rent being estopped from denying that the landlord had a title to the land. As such estoppels depend upon conduct there is no limit to the number of possible estoppels.

In conclusion then, after hearing all the evidence, accepting some and rejecting others, the jury or judge must "find the facts". In civil actions the party having the burden of proof upon him must satisfy the tribunal that the reasonable probability is that his evidence, or so much of it as will sustain the action in law, is true. If neither party's evidence be accepted, the one who has to establish his case will fail, and in yet other cases the Court will accept the evidence for the defendant, or the finding may be for the plaintiff on one issue and for the defendant on another. Costs in criminal law call for special consideration.

CHAPTER IV

PRINCIPLES OF ADJUDICATION

THE facts being ascertained either by judge or jury and the necessary inferences having been drawn from them, the question arises, what result has such finding in law? In order to arrive at a judgment, the appropriate law applicable to such ascertained circumstances must be applied. Its sources may be discovered in specific enactment of Parliament, in the application of principles of law recognized by the Courts (these to be gathered, if possible, from previous decided cases), from the opinions of persons to whom respect may be paid as authorities (the old rule was that they must not be living), and by recourse to undisputed customs of law. Finally, though this is rare, the actual case may have been so precisely decided previously as to constitute *res judicata.*

As to specific enactment, the constant increase in legislation is making the use of statutory reference very frequent. Sometimes an Act of Parliament will expressly override some hitherto accepted principle; more frequently it will but modify it, or Parliament may be content, as in the case of the Sale of Goods and Bills of Exchange Acts and many other statutes, to declare and codify, with or without amendment, the existing Common Law in legislative form.

The interpretation, however, of Acts of Parliament, or sub-legislation made under them, will itself proceed according to recognized principles, some grammatical and logical, some having regard to the declared purpose of the legislation as disclosed in the language of the Act and other Acts preceding it, to which will necessarily be added a consideration of the existing law on the subject apart from legislation upon it. The nature of the legislation itself, whether it be destructive of pre-existing private rights, retrospective, penal and so forth, may also prove material.

Broadly speaking, an Act of Parliament (regard being had to the universality of its application) is to be construed

literally and the Court will confine itself to what the Act actually declares, but the fact that some of its clauses or those of some similar act may have already been interpreted by the Courts will often bring the application of precedent even into the determination of the meaning of legislation.

But the more frequent use of precedent is in order to establish principles of law where Parliament has either not enacted or has spoken ambiguously. The use of the idea that Courts are "bound" by their own decisions or by those of higher courts has, I think, produced in the public mind an impression that, where precedent can be found, its application to particular cases is merely automatic. Apart from the very rare instance where the facts of one case are precisely the same as those of another, the proper use of precedent is not uncritically to enforce obedience but to elucidate principle, for the wise Judge uses authority as an aid to juridical understanding and not as a solution. It should be recognized that in deciding a case it is difficult for the Judge not to make observations "obiter", remarks not perhaps strictly necessary for, but illustrative of, the reasons for his decision. This part of his judgment, however illuminating it may be, is not binding. Even where principle is so defined as to compel obedience, the task still remains to unravel the judgment in order to ascertain which part of it contains the reasons for the decision—no easy task when, as sometimes happens, half a dozen learned Lords have arrived at the same conclusion for different reasons.

It must be admitted that there are many factors at work in modern courts of law which tend to obscure the importance of principle in juristic determination. Apart from arbitrary intervention and amendments of law by the Legislature, the ever-growing number of decided cases, and the uncritical multiplication of law reports (uncritical, because many of them determine no new point whatever), and the constant increase of "Digests" and textbooks on every branch of the law—all encourage mechanical solutions and the unintelligent search by counsel for mere precedent. The tendency of the Bar to specialize in certain departments of law, and a general growing disbelief in final principles not only in

law, but in ethics or in sociology—all these contribute to produce an empirical attitude which results too often, both at Bar and on the Bench, in a deliberate aversion from generalization of all kinds—a hand-to-mouth habit which, if pursued to an extreme, may ultimately rob the practice of law of all pretensions to be a science.

On the whole, it is a sign of the incompetent lawyer or judge that he is over-impressed by citation of particular authority. Authority is but a guide to juridical understanding —a servant, not a dictator. In early days, perhaps, the precedent, as such, was decisive, for, as wrote Bracton, "if any new and unwonted circumstances shall arise, then, if anything analogous has happened before, let the case be adjudged in like manner, proceeding a similibus ad similia". Again, in the middle of the fourteenth century, Hilary J. says: "We will not, and we cannot, change ancient uses. . . . It will be a bad example, students will never believe their books if a decision laid down so many years be now reversed".

Not until late in the seventeenth century is the process of judicial reason, "*obiter*" and "*ratio decidendi*" (that not essential and that necessary for the determination of a case) clearly distinguished. But finally, Lord Mansfield, in Jones *v.* Randall (1774), said: "Precedents serve to illustrate principles".

We come, then, to the great problem of this ascertainment of principle, for which the use of precedent is but one method: it is to this end, to bring his case within a rule of law, that competent counsel directs his argument.

While some basic rules of Common Law may be still the subject of dispute, many are now established beyond question. They do not always lead to justice. It is but a few years since the invidious doctrine that rights of action in Tort die with the possessor of them, or that a man was liable for the wrongs of his wife, were expressly annulled by legislation.

It is now generally recognized that the definition of Common Law, such as found favour with Blackstone under the phrase "General custom of the realm", under-emphasises that great part which judicial interpretation and, indeed,

judicial initiation have taken in its development. If original Common Law had but been a mere assimilation of local custom (Mercian, Danish, or the Law of Wessex), it would have proved a sterile thing. Once it is realized how much amplification of local custom in the Common Law was effected by the King's Judges, it will readily be appreciated that what we call Common Law is in truth largely the product of judicial creation.

Yet, when all allowance is made for such gloss and interpretation, the English customary foundation cannot be denied, for, as we have seen, the old laws originated in communal conduct, enforced by the prevailing ethos with all its unquestioned supernatural and social sanctions.

Customs, primarily, have nothing to do with litigation, which only becomes active when they are likely to be violated. Custom is but habitual practice; even when in a dispute the extent of their application has to be declared. The habit of unlearned authority, such as the Sheriff, would incline rather to state the custom than to comment on it. In the seventh century, however, Wessex and Kent, recently christianized, under the influence of the Church began to write down their laws, and from the time of Alfred the output of codes of law custumals and charters is copious. They concern ranks of men—noble, freemen and serfs; the family; the clergy; crime and its abatement; money fines and punishment of death; treasons and theft; homicide; contract; land laws and other matters.

Under the earlier Norman Kings, these Saxon laws and their procedural methods persist, nor is there evidence that William I did not carry out his promise to maintain the prevailing English law. Nevertheless he placed all men, English or Norman, under his peace. The local law remained, but in the King's Court, the Curia (as is said in Pollock and Maitland), under the influence of clerical canon law, was rationalized.

The fact emerges that, unlike the Roman Law of continental countries, basic juridical notions here still derive from unwritten assumptions: assault, negligence, even murder—all these have to be sought for their origins in the

old Saxon or Danish customs of England, united by the King's Court into a Jus Commune. On the other hand, it is difficult to exaggerate the influence of foreign notions in the King's Court (where the proceedings were for long in French) in matters of procedure, practice and logical reasoning.

Two Norman introductions of cardinal importance have already been mentioned, the use of Inquests and Juries, and the notion of a Common Law—the later ideal of universality clearly being derived from civil or canonical sources.

But the most far-reaching result of the renewed study and influence of Roman Law lay in the gradual acceptance of the idea that law is not solely a matter of custom, but that the Sovereign Body in a community can itself make new law. This idea is an inheritance from Imperial Rome; it spread to England, and while the early Norman monarchs abstained from legislation, and in most cases, indeed, in terms confirmed the old customary law, from the time of Henry II we find an increased use made of Royal ordinance and mandate, mostly on the advice of the "wise men" and magnates—a power which later came to be shared by the House of Commons, issuing forth in Acts of Parliament. In the time of Henry II instructions to Judges and general commands came often from the King himself, but gradually, certainly by the reign of Edward I, the advice and consent of the great men or Council is usually sought.

It was not, however, until 1882 that the statutes passed before the reign of Queen Anne were published; in earlier days the difficulties which must have been encountered in order to ascertain the statutory law must have been considerable. It is not surprising that, in mediaeval times, judges often refused to take a statute as law unless the King directly commanded it; even forgeries of statutes were not unknown; but finally, in the reign of James I, Acts of Parliament came to be regarded by Coke, C. J., as "so transcendent and absolute as cannot be confined either for causes or persons within any bounds".

Another continental influence of great importance is to

be found in the conscious use of logic in the later mediaeval scholastic period. The judges for the most part had been trained in the discipline of the Trivium—Grammar, Logic and Rhetoric, studies deriving from Aristotle and his commentators. In the twelfth century we note the growth of centres of learning, often round a celebrated teacher, which, systematized, developed into Universities. A licence to teach came to be given by the Archdeacon or Cathedral Chancellors and gradually became an obligation. Formed into a guild or Universities of Masters, we find the teachers organized at Bologna to teach law. In England, on the disappearance of the clerics from the secular courts (they were forbidden by episcopal constitution in the reign of Henry III from being advocates in foro saeculari : Pope Innocent III had expressly forbidden them to teach common law, as being founded merely on custom and not on Imperial Constitutions), the legal laity forsook Oxford, where the civil law was taught, and set up their own common law university in the Inns of Court in London. But the habit of methodical reasoning, imported into the law by the ecclesiastics, must have remained, and, although logic, as such, has never been insisted upon in England as part of a lawyer's education, yet the rational influence of Scholasticism is apparent to anyone who studies the Year Books or other early reports. It may be hoped that it is not yet defunct.

The inductive method, drawing general conceptions from a number of precedents, must follow a logical process. The complementary deductive art of inference also involves the ordered use of the reason. To say, as even some judges have, that law has nothing to do with logic appears to be absurd. No doubt what is meant is that there are other factors at work as well as logic in determining law, but they who make so loose an observation are sometimes themselves good object lessons in the need for logical utterance. As Professor Goodhart has pertinently remarked : "Unless we assume that judges do act in accordance with Reason, what is the value in studying past judgments ?"

The first principle to be invoked was to follow the past : "*Stare Decisis*". This need, after the Year Books, produced

many other reports: Plowden, starting in 1550, Coke 1572, Hobart 1603, and so on. The House of Lords, the supreme tribunal, failing adequately to distinguish between its legislative and judicial functions, for long objected generally to publication. In 1698, Shower had offended, and further publication of reports was voted a breach of privilege. It was not until 1812 that the full reasons for the Lords' judgments appear in Dow's reports.

Abridgements and digests of decided cases, used with caution, facilitate the work of exploration, nor are textbooks and encyclopaedias of law to be disregarded, provided always that a critical attitude is preserved towards them, and that their propositions be tested by references to the actual authorities when necessary. As the certainty of judgments comes to be established, it becomes more closely a rule that, if unambiguous, the decisions of higher tribunals are to be followed. In the eighteenth century a judge did not feel himself absolutely bound by authority, or by cases and rules arising from them (if "plainly unreasonable and inconvenient", to use the language of Parke, J., speaking in 1833); a departure from precedent which would not be justifiable to-day. In 1898, Lord Halsbury declared definitively that the House of Lords was bound by its own decisions. Of appellate courts, the opinions of the Judicial Committee of the Privy Council have not, in theory, binding force; strictly, it is but an advisory committee of the Council, and not a Court at all.

We have now considered two methods of arriving at the law, the method of logic and the method of following precedent which has sometimes been called the "method of history"; but there remains the case where no exact authority can be found to follow or from which no logical deductions can readily be formed. Thus, for example, the growth of new methods of trading in the eighteenth century produced a need for the incorporation of parts of the Law Merchant, an international system, into the Common Law, and in our time the monopolistic growth of trusts, combines and trade unions has demanded new solutions in uncharted areas of the rules applicable to Conspiracy and Restraint of

Trade. Thus arises the need for a third method, which we may call the "sociological", which acts by reference to a consideration of the usages and needs of society at the time of the litigation. Combinations to secure minimum trade prices, so common a feature of modern commerce, have now been considered legitimate : in earlier times they would have fallen under the ban of being in restraint of trade. The newspaper has profoundly modified the law of libel, a wrong almost unknown to early common law. In some questions, such as those raised by public policy, the immediate standards and ideals of the age may become almost decisive.

Yet even here the Judge should apply, not his own private opinions, but an objective test. The customary prevailing moral habits of good citizens should be his criterion, not his own personal preferences. Nevertheless, in matters such, for example, as protection of liberty, the views of the Judge on the respective rights of the citizen and the State can hardly be excluded, more particularly where society, as a whole, entertains divided opinions. In this case, where the Judge cannot obtain a consensus, what standard has he except his own opinion ?

The real distinction in practice, however, in these disputable matters will be found rather to lie between lawyers and society at large than between individual judges. The life and training on the Bench predisposes to an approach of fundamental questions in the same manner. For many years I sat in the Court of Appeal with many different judges of very varying temperament and private opinion, and have rarely known a case where we did not at any rate approach a hitherto undecided problem involving social or individual ethics from substantially the same angle, and answer it more or less by the same methods, although our conclusions might diverge. Whether the public at large would have been influenced by similar considerations is a very different matter.

In essence, the Judge will be far more concerned that juridical principles be followed than with the actual results of his decision. An instance will suffice. By statute it is lawful for a competent doctor appointed by a local authority to allow the release of a person detained on account of

unsound mind. It is also lawful for his deputy to act in his absence. Such a deputy is required to act under rules, one of which authorizes his appointment, to be passed by the local authority and approved by the Ministry of Health. A deputy, apparently duly acting, allowed a lunatic to be released who assaulted the plaintiff. In an action it was held that the plaintiff had no remedy as the doctor had not been negligent, but on appeal it was discovered that, by an oversight, the rules under which the deputy had been authorized had not been approved by the Minister. His appointment was, therefore, invalid, and consequently the plaintiff was allowed to proceed. The public, unless willing to help the plaintiff at all costs, would denounce such a conclusion as a quibble; yet it was a valid conclusion in law and commended itself to the whole court.

Finally, apart from the prevailing sociology, recourse has sometimes been made to what may be called the ethical method of juristic elucidation. Such was a reference to the "Law of Nature" of the Stoics, in the conception of Natural Justice which still lingers on in certain areas of the law.

In the Middle Ages, says Dr. Carlyle (*Mediaeval Political Theory*), the whole aim of Law was approximation to ideal justice. We know how such a notion was interpreted by Plato. In Aristotle the distinction between equitable and strict justice is apparent. Equity was a part of the Greek notion of Justice, as also in Rome, the aequitas naturalis, the notion of trusteeship, "unjust enrichment", unconscientious bargaining, fraud and the like, illustrated an increasing flexibility. Under Christian influence, the ward was protected against the guardian, the weak defended against the powerful. In England, in the exercise of the prerogative of equity in the King, later administered by Council or Chancellor, there is little sign of rule or precedent; the conception is a personal moral one, modifying the "rigor juris" into "aequitas". The King's Court also, like the King himself, acquired a discretionary power which the old Saxon local courts did not possess, for the King and his officers are to defend the poor and defenceless, a

duty which did not fall upon the Sheriff. Consequently, Common Law Courts also, within limits, began to exercise equitable jurisdiction—until recently the Court of Exchequer, for example, had its "equity side". Equity is not a separate system of law. It presupposes, says Maitland, the existence of Common Law.

This is not a treatise on legal history, and the development of a special court to exercise equitable remedies, the Court of Chancery, need not detain us. The residual jurisdiction to dispense with procedural and other formalities in Chancery suits of necessity is mentioned as an example of the invocation of the ethical method. If the discretion was greater than in the Common Law, the greater was the need for some metaphysical or canonical standard. Sociology, as a science, was unthought of, but guidance was found in the Law of Nature or in the Christian religion. In the time of James I, under the influence of Bacon, the Chancery became a recognized Court of Judicature ; by the end of the seventeenth century, having survived the fate of its colleague, the Star Chamber, it became stabilized, as also did its remedies. At length, in 1903, a Chancery Judge was found to declare that the Court was no longer a Court of Conscience.

Nevertheless, the Chancery, and the equitable remedies which came from it, profoundly affected the general administration of the Common Law, so that when the fusion took place in 1873, already a great assimilation had been effected.

The principal ethical notions which have in greater or less degree influenced the Judiciary for the most part have been, it has been stated, Christianity and the Natural Law. Of the Natural Law we have spoken ; as to the religious influence, though law is no longer conceived as being directly inspired by God, yet, the judges, being for the most part Christians, and England still, presumably, a Christian country, it is suggested that appeal to the Christian standard as ultimate, even if only subconscious, is far more insistent among judges than many modern writers on Jurisprudence would have us believe. In writing on the subject, they are inclined to follow, for the most part, the practice of commentators on other aspects of

sociology and ethics and, either by design or indifference, to ignore the historical religious basis.

"The Judges," wrote Sir John Fortescue, himself one of them, in the reign of Henry VI, "sit from eight to eleven. They then study the law, read Holy Scripture or use other contemplation at their pleasure". As Mr. Richard O'Sullivan says, "They are Christian men" (*Christianity and the Common Law*). To-day, we still open the year's work with prayer. In 1675, Lord Hale stated that Christianity was part and parcel of the Law of England. As late as 1867 it was held that the use of a room to be used in impeaching the character and teachings of Our Lord was one employed for an unlawful purpose. Finally, having regard to the disclaimer by Lord Sumner in 1917 of the dictum of Lord Hale, when that very learned Law Lord declared that to say that Christianity is part of the Law of England is "really not law but rhetoric", we are left in doubt as to the position, but that some Judges may still have final recourse to Christian considerations without impairing their juridical obligations, in view of the Common Law and equitable assumptions of the past, can scarcely be questioned.

It is now very generally recognized among logicians that the processes of reasoning vary according to the subject matter to be considered and the order of result required. The means whereby a theologian considers the nature of God are very different from those employed by a mineralogist in prospecting for precious metals; each department of knowledge demands its own technique.

This necessity arises from the nature of reasoning itself: the concepts which the mind must form to arrive at a judgment are produced by a process of abstraction; in the old philosophic phrase, they are Universals, and their universality, to be appropriated for the particular purpose for which they are imagined in the mind, can only be made manageable by a careful curtailment of their extension to the subject matter under consideration.

In the case of law and legal determination, the first process of the mind is to limit regard to the persons and things brought to the attention of the judicial mind to such

of their juridical aspects as may be relevant to the issue. Thus, in a Chancery action upon a trust, the status of a litigant as trustee will possess an importance which it would not have if he were to be considered as a voter in an election petition. A motor car in a negligence case may call for consideration of its horse-power ; its use in an election petition will demand quite other considerations.

The basic principle of abstraction in law must be with reference to rights and duties of juridical persons, including the State itself. The conception is to be regarded both under the categories of ethics and sociology, but is not coterminous with either. There are many problems in ethics which do not directly concern the law, and the law may be compelled to defend privileges and anomalies which can have but little social sanction, and are, admittedly, of no value to the community ; they may be merely of historical origin, or the result possibly or erroneous reporting or doubtful law in the past. The old Common Law rules against certain assignments of rights may be cited as an example. Some of these impediments have been removed by legislation, but some have not—it would be difficult to defend to-day the limitation of right to damage in slander which does not obtain in that class of defamation known as libel, but where a legal anomaly has been allowed to remain, it must be obeyed.

In practice, the problem in a particular action will not concern all rights and duties at large, but only those which reasonably arise on the issues, and it is the purpose of the preliminary pleadings, which are to be found in one form or another in nearly every form of jurisprudence, to clarify the dispute by so formulating the contentions.

In Rome, it was, for the most part, the duty of the Praetor to settle the issues, the preliminary "in jure", followed by the trial "apud Judicem," the Judex being a private person. This is not surprising, in early English law also it was in the preliminary encounter that formalism reaches its height. Spoken words before the magistrate, which must be accurate, the *legis actiones*, are comparable with the precision of the early English pleader, "a formal statement bristling with

sacramental words, an omission of which may be fatal", if it be in variance of count or writ.

This attention to exact form in the language of writs, pleadings and indictments, lingered on both in Common Law and Chancery until the nineteenth century was well advanced, but to-day it may fairly be said that the pleadings, properly drawn, with ample power of amendment by the Judge, do give a fair account of the legal issues raised. They will show on what principle the plaintiff proceeds, what the defendant admits and the facts relied upon, but not the evidence which will support such facts; in general, what are the issues between the parties.

The attention of the Judge is thus limited by the pleadings, by the submissions of counsel, and by what the Judge with his experience deems to be relevant. He will bear in mind that he may subsequently be called upon to state the reasons for his decision, and that such reasons will have to be formulated so as to be intelligible to a possible appellate tribunal, to the Judges who will come after him, to the Bar and to the legal profession generally, and (if the subject matter permits and requires it) to the whole body of his educated fellow subjects. Thus, inevitably, in giving the grounds of his decision, if any new matter arises at all he will have in greater or less measure to expound the law, and his exposition, once delivered, will contribute for good or ill to the ever enlarging material of the corpus juris.

"The Law," said Coke, "requires long study and experience before that a man can attain to cognizance of it." "Causes are not to be decided by natural reason but by the artificial reason and judgment of the Law." This artificiality, while recognizing the needs of particular treatment to particular subject matter—a requirement of all scientific knowledge—is what modern English judges have been trying, compatibly with their sworn regard for the "Laws and usages of this realm", to remove, so that their conclusions, so far as may be, will appeal to the good sense of the ordinary man.

Indeed, it is just in this dichotomy of artifice and common sense that the judge finds his greatest difficulties. Equity is

no longer an elastic remedy, it is as much or as little standardized as the Common Law; responsibility cannot always be thrown upon Parliament, though to blame the legislature is a pardonable weakness of some Judges; a *via media* must be found, for it is disastrous when declared law does not command the respect of ordinary good and lawful men.

Thus, a logical conclusion being reached, when it is one which offends the Judge's sense of right, what is he to do? The cases vary—sometimes, under the influence of the principle of *stare decisis*, he is constrained to begin his judgment with the ominous words, "Much as I regret it". Sometimes the law is not so clear but that he may see a way out, but never must he forget that it is no absolute protection for him to say, "What I am about to decide is no new law and will not affect future decisions". At any rate, an appeal court cannot so avoid the creative factor implicit in its own decision.

The tendency to give to Judges in many matters a declared "discretion" has greatly increased of late times; by recent statute the wishes of testators may now be modified in their effect by the Court. Yet even here, said Lord Halsbury, discretion must be exercised according to "the rules of Reason and Justice, not according to private opinion"—it must be a "judicial discretion", but what does this really mean?

It is assumed that the Judge will decide each case of discretion on its merits without preconception and will use his mind objectively; yet even then the question remains, what elements do enter in the case when a discretion is properly and judicially exercised? First, it is apparent, the object of the exercise of the discretion and the results which will be produced thereby must be considered. The Judge desires to do what is just, but what is just in a particular case? I am assuming a matter to be decided when there is no principle to be found, no rule and no authority.

In practice, of course, such cases are extremely rare, but for the purpose of testing the matter I will assume such a situation. Perhaps the matter is not so difficult as at first

blush it appears. Judges are Englishmen, and as such share with their compatriots a general idea of what constitutes justice. It is unjust that a man's liberty, property or reputation should be taken from him unless the law requires it. On the other hand, that a poor man, deprived of the necessities of life, should, apart from State relief, have no right to work to earn his living or that others should live in plenty without working is, in the present state of social morality (which for this purpose the Judge neither approves nor condemns), an accepted condition. Whatever the subsequent treatment, a plea of want can be no defence to a prosecution for larceny, so also the utter inadequacy of any *quid pro quo* can be no defence to an action for breach of contract. For a Judge to allow his mind to be influenced by purely ethical considerations, even in cases where the law was not certain, would be to allow the subjective element to enter it.

But in such cases, in following the consensus of opinion of his reasonable neighbours, though he will not stray from the "usages of the realm", he may yet find elements of assistance. The consideration of other great systems of Law may help him. Recently, in trying a case which involved the pursuit of bees on to another man's land, the only authorities to be found were in ancient Roman Law, which had been copied without amendment into Bracton and Blackstone. In such circumstances the Court was driven to accept Justinian as a guide, though many modern bee-keepers, not property owners, would have disagreed with his opinion. It will be observed that in considering foreign systems of Jurisprudence in matters affecting rights, for the most part, acceptance has only been accorded to those laws which have come from countries which at one time or another have accepted the basic principles of that Christo-classic society on which Europe has developed. It is unlikely that the laws of countries which have repudiated Christian assumptions would prove acceptable to English judges.

Thus, on a question whether a case might more conveniently be tried in Nazi Germany or England, it was stated to the Court here that the plaintiff in Germany would have

no right of audience on account of his not having full citizenship. The Court decided that the German tribunal, according to English legal notions, was not a court at all, in that it would not hear both sides impartially, and the trial was ordered to take place in England.

We have spoken of discretion, but in reality all decisions, in greater or less degree, unless they are in the rare category of Res Judicata, are in the discretion of the Judge. The disturbance on appeal of his decision is less likely where the matter is one avowedly within his discretion, though even here the Court of Appeal can review it, if the result of its exercise would result in injustice.

As we have seen, it is in deciding questions of public policy that the personal views of the Judge are inevitably most emphasized, though, even here, available applications of peinciples are to be found in the authorities. In Contracts in restraint of trade or, for alleged immoral considerations, in Copyright of alleged immoral books, in relations with the enemy in war-time, and in many other cases, rights otherwise enforceable have been held by the Courts to be nugatory on public considerations. Yet, Dr. Robson has said, "Public policy is nothing more or less than the expression of certain social sympathies and antagonisms of judges, certain ethical ideals which have taken definite form in particular decisions, and in that way become crystallized into stable doctrines" (*Justice and Administrative Law* [1947 ed.], p. 306).

He defends this attitude. "Everyone who has to use a discretion," he points out, "must in the last resort exercise it in accordance with preconceived ideas of what is desirable" —a background of social prejudice is as necessary for judges as for the rest of mankind. I believe this to be not wholly correct; rather would I accept the views of Judge Cardozo in his *Nature of the Judicial Process*, "that my duty as a Judge may not be to regard my own aspirations, convictions and philosophies, but those of men and women of my time". This seems to introduce that objective reference which is so essential in judgment, where rule and authority are lacking as a guide. I, personally, may believe in the indissolubility of the married state, I may regard it as a

sacrament, but that should not interfere with me as Judge in considering questions of public weal. Assuming that the people as a whole, both through Parliament and in their own minds, have accepted divorce as a social institution, I ought not to hesitate to apply an approval of morality based upon that assumption.

It is well known that the power of English Judges to "make law" is much greater than is that of their Continental brethren who have inherited the limitations imposed upon them by Imperial Byzantine Rome. "The interpretation of statute," says Justinian, "should pertain alone to the dignity of the Emperor. He is not only the sole author, but the sole interpreter of statutes. No Judge is to consider himself bound by the decision of other Judges. Decisions should be based upon laws (i.e. imperial commands) and not on precedents".

This Byzantine outlook undoubtedly has had great influence on the whole development of continental justice. Yet even in our system it must never be forgotten as Lord Esher has said, "Judges do not make law, though they frequently have to apply law to circumstances as to which it has not been authoritatively laid down. The decision of a Judge is never more than an interpretation and the competent Judge realizes this fact and reasons accordingly".

It may be said that the whole temperament of Englishmen towards their law, and, indeed, their politics, has been based upon the empirical method of dealing with problems as and when they arise; there has always been a desire to refrain from over-definition and proleptic law. It would be a very grave and revolutionary step to break with a habit of life which has become second nature not only to lawyers but to nearly all the inhabitants of this country and those other parts of the world which they have peopled. The English system is far more elastic and organic in its nature than is the occasional and necessarily infrequent promulgation of codified law didactically by a legislature which leaves no room for change between one issue of a code and the next. A system of case law, such as obtains in England, is far less liable to abuse by despotic persons than is a decision under a system of codes or acts or edicts, alterable at will. It is not mere

accident that the judges in the Common Law stand upon a higher plane in the constitution than do the judges in the Continental system; for the former are called upon to interpret the law in which they themselves, as spokesmen of the common will, participate, while the other have merely to enforce the will of the law-making authority. In many countries where arbitrary law obtains, not only is the Judge subject to dictation, but often is himself avowedly the dependent servant of the Executive.

CHAPTER V

COURTS OF CRIMINAL JURISDICTION

THE question of civil proceedings having been discussed, we next consider the criminal courts and procedure governing crime. The Courts dealing with criminal matters, the Assizes, the Central Criminal Court in the London area, the Courts of Quarter and Petty Sessions have already been mentioned. It is now necessary to examine them in greater detail.

In very early days matters now dealt with by civil laws were frequently to be found in criminal proceedings, indeed the distinction between a criminal and a civil matter, as has already been pointed out, was very loosely drawn. Thus, in the case of assault (the consequences of which may be either criminal or civil proceedings) in the days of Ethelbert it was enacted that "If one man strike another with the fist on the nose—three shillings". "If an eye be struck out, let compensation (bot) be fifty shillings". Some such payments are to be made to the King, some to individuals, the underlying object being to prevent private vengeance or blood feud. In England, the elaborate system of Roman Law, as inaugurated by Sulla, distinguishing civil and criminal remedies, was loosely drawn. As Maitland, the legal historian, wrote: "We have no proof that during the five centuries which preceded the Norman Conquest any one copy of a Roman Law book existed in England". A civil matter, the title to land, is first to be found recorded in the seventh century, so also Wills came into use with the spread of the Church's influence, remaining largely their concern until the nineteenth century.

It was in accordance with the practice which had obtained ever since the failure of the Western Roman Empire that the Norman Conqueror, William, allowed the "natives" to continue to live under their old law—that which existed in the old County Court, presided over by the Sheriff and in the Hundred, a smaller division within the shire. The Frank Pledge system, whereby neighbours, grouped in tens, were

made responsible to produce the accused, continued. On appearance, the complainant would swear that his accusation was true, and the defendants by his witnesses to character; his "compurgators," would make denial. Then the court would proceed, if necessary, by Ordeal, an archaic appeal to the Deity, by plunging the hand into boiling water without blistering, carrying red hot irons, swallowing without choking, and so forth. There was no jury to ascertain the facts, no judges to decide the law. By the Normans a new superhuman test, the Ordeal by Battle was added, a method of adjudication not formally abolished until 1818; it was another method of supernatural procedure.

It has been already suggested that the general outlook of the community towards events has imperceptibly altered the nature and class of evidence and general procedure. By the time of Henry II, experts in law, beginning to be influenced by civilian and canonical methods obtaining on the Continent, had largely rationalized the old Saxon system. Precedents were being collected, Writs issued and, what is here particularly noteworthy, the distinction between crimes against the State and civil disputes more clearly made. Bracton (Henry of Bratton), writing in the middle of the thirteenth century on the Laws of England, was well acquainted with Roman jurisprudence. The "Inquest", a royal command, as addressed by the Judges or Sheriffs, to a body of persons to answer specific questions, which was used not only for litigation but also in administration, as in the Domesday Book, was extended to criminal matters and Inquest was made of jurors representing the Hundred asking if they suspected anyone of crime. If so, their finding, called to this day an indictment, put the accused upon his trial. In 1215 the Lateran Council forbade the clergy to take part in the old Ordeal by fire, and thereafter it died out, together with the process of accusation and appeal, for, after the abandonment of the ordeal, it became necessary to summon a second jury to decide in a mundane manner upon the suspicions of the first; hence the origin of the two jury system—grand and petty—the former, the presenting Jury, was abolished only a few years ago.

By 1265, the Assize of Gaol Delivery, and Trial (Oyez

and Terminer) were already regulated by statute, and from the time of Edward III the Quarter Sessions, composed of all the justices holding commissions of the peace within the county, were also taking gaol delivery and hearing lesser pleas of offences and trespasses against the peace. Since the Act of Edward III, each county has had a separate commission. By 1834, some eighty-five boroughs had their own special quarter sessions, mostly presided over by their Recorder. Some being themselves "counties of cities", entitled to their own sheriffs.

As to County Quarter Sessions, the law now requires that this court, if it is to exercise the full powers now given to it in indictable cases, must have as Chairman (and Deputy) a qualified lawyer, approved, unless he has held high judicial office or is a county court judge, by the Lord Chancellor. He it is who directs the jury before their verdict, though all the justices present should be consulted (they often are not) as to sentence in the event of a finding of "guilty". In Boroughs where there are separate Quarter Sessions, the Court is, by statute, placed under the sole control, save in licensing matters, of a Recorder—a barrister of not less than ten years' standing. There are special provisions for Quarter Sessions of the counties of London and Middlesex, and their Chairmen and Deputy Chairmen receive salaries.

There remains to be described the special court, of equal jurisdiction to Assize Courts, acting in and around the area of the Metropolis, known as the Central Criminal Court, and the residuary jurisdiction of the Judges of the King's Bench Division, functioning not as Commissioners of Assize, but sitting as a Division on what is called the "Crown Side". In this latter case the trial is, as the saying goes, "at bar," in the case of treasons and felonies, before a divisonal court of more than one judge ; in the case of misdemeanours one judge is sufficient and a jury may be had. With regard to the Central Criminal Court, this is the creature of a statute of William IV. The Judges include the Lord Mayor of London, the Lord Chancellor, the Judges of the High Court and any one who has held these offices, and the Recorder of London, the Common Serjeant, and a Judge of the Mayor's

and City of London Court. In practice, though the presidential chair is left for the Lord Mayor, a single judge of the King's Bench actually tries the most serious charges (there are usually three or four courts sitting at one time), and the proceedings resemble substantially those held at the Assizes or Quarter Sessions respectively, except that they sit at least twelve times a year.

The criminal process of Impeachment, of great historical significance, which (unlike the trial of peers before the Court of the Lord High Steward for treason and felony, now abolished) still exists, consists of charges preferred by the House of Commons before the Lords. Managers are appointed by the Commons and the accused may be defended by counsel. The charge is for "High Crimes and Misdemeanours" and a capital sentence may be given. The last trial was in 1805.

The Justices of the Peace, who constitute the Quarter Sessions for their County, a Court inferior in jurisdiction to the High Court or Assizes and sit also in petty sessional divisions, owe their present existence to an Act of Edward I (1327) wherein it is provided that "for the better keeping and maintenance of the peace, that in every county good men and lawful should be assigned to keep the peace". In 1360, this was followed by a provision to the effect that "in every county of England there shall be assigned for the keeping of the peace one lord and with him three or four most worthy in the county with some learned in the law" with power to arrest whom they may find by indictment or by suspicion and put them in prison, and determine felonies and trespasses done in the county.

Justices of the Peace are appointed in each county and for each borough which has its separate commission of the peace, by the Crown on the recommendation of the Lord Chancellor, who is advised as to the counties by the Lord-Lieutenant, with the assistance of an advisory committee, and as to boroughs by separate advisory ones. The Chancellor has full power to remove Justices from the commission and they are offered, when their services are no longer available by reason of infirmity or other good cause,

an opportunity to be transferred to a "supplementary list", where they are still capable of performing such functions as witnessing declarations, but no longer sit to adjudicate. In addition, the chairman of County Councils and of Urban and Rural District Councils are *ex officio* magistrates in their county while they hold office. Privy Councillors are ex *officio* magistrates throughout the Kingdom and so do not need the approval of the Chancellor. The Petty Sessional Divisions where, as a rule, a small number of local Justices sit, deal with cases of summary jurisdiction and the preliminary investigation of indictable offences (when not dealt with summarily) before committal for trial.

As to Boroughs having their own Petty Sessions, in some few cases there is a Stipendiary, who is paid by the town, but appointed by the Home Secretary. He, unlike magistrates except those in the City of London and the salaried metropolitan magistrates, can sit alone. In the case of the preliminary investigation of indictable charges one magistrate is in any case competent, but in practice two or more normally sit. Bias may well invalidate their decision.

The magistrate for a borough must reside or occupy a house within seven miles ; the Mayor is an ex-officio magistrate, but neither he not the other Justices act at Borough Sessions when there is a Recorder.

The actual practice of the Justices in Petty Sessions differs from that of other legal tribunals in that, being for the most part unlearned in the law, they are dependent in greater or less degree on the advice of their clerk. He must be a barrister or a solicitor, he usually is a solicitor, or, in exceptional circumstances, a person who has served fourteen years as an assistant to a magistrates' clerk. His appointment, which is made by the court he serves, must be confirmed by the Home Secretary. Out of court he is the officer who controls multifarious preliminary matters, in court his duties are less clearly defined. Often he examines witnesses who are not legally represented and advises the magistrates on matters of law ; they may accept or reject his advice as they think fit. They are not required, as are Quarter Sessions, if they wish to exercise their full jurisdiction, to have a chairman

of legal knowledge, nor indeed any permanent chairman at all.*

Since 1933, every Petty Sessions, apart from the Metropolitan area where special provisions obtain, is required to constitute out of their number a "juvenile court". A panel is set up in each petty sessional division of magistrates specially suitable to deal with juvenile cases. The Court, constituted from the panel, must consist of not more than three justices, one of whom must be a woman. The Court sits in a room different from that in which ordinary sittings of the Court are held, or upon a different day, and only the parties and their advocates, the Press and witnesses may be present, and other persons, such as parents, whom the Court allows to be there. Charges affecting children or young persons are dealt with and, as regards young persons charged with an indictable offence, other than homicide, the Court may with consent and taking into account similar matters as may arise in the case of an adult, deal with the case summarily.

Yet another tribunal with criminal jurisdiction is the Court of the Coroner. This is a very ancient office, so called because originally the Coroner was particularly concerned with pleas of the Crown; the Lord Chief Justice is still principal Coroner for the Kingdom, but in each county or county borough a Coroner is now appointed by the Council, though formerly by the old County Court of the Sheriff, a meeting not to be confused with the present civil County Court.

The duties of Coroners are now confined, apart from the determination of Treasure Trove, not a criminal issue, to an enquiry, dating from the time of Edward the First, into cases where a person has been "slain or died suddenly as to the manner of death". Now, by the coroner's acts, the Coroner normally summons a jury to enquire into the fatality. The Coroner presides and evidence may be tendered and all persons examined whom the Coroner deems necessary; he may also direct a post-mortem to be held.

If, by verdict, a person is found guilty of murder or other homicide or of being an accessory before the fact to murder,

*For further information see the Royal Commission on Justices of the Peace (1946-1948 Cmd. 7463).

the Coroner may commit such person to prison. An acquittal by the Coroner will not operate to prevent a committal on the same offence by the Justices.

To sum up, apart from the now almost obsolete method of information by the Crown itself through the Attorney General, and the still rarer case of a private criminal information—limited to serious and notorious misdemeanours, riots and libels tending to disturb the Crown or Government, the normal method of bringing a case before the Judges at Assizes or at Quarter Sessions is either by committal by the magistrate sitting as a preliminary court of enquiry or by the verdict of a coroner's court.

At common law there existed no court to hear appeals in criminal cases except special limited errors of law, but statute has provided a remedy. By the Criminal Appeal Act, 1907, a Court of Criminal Appeal was constituted, consisting of the Lord Chief Justice of England and the Judges of the King's Bench Division. The old method of dealing with errors of law before the Court of Crown Cases Reserved is no longer employed and the Court of Criminal Appeal may allow appeals from Assizes, the Central Criminal Court or Quarter Sessions on any point of law and with leave to appeal, deal with questions of fact or mixed law and fact, and also against sentence, which the Court may, and sometimes does, increase. The Court may refuse to quash a conviction even when the appellant shows some technical fault in the proceedings, if it thinks that no substantial miscarriage of justice has taken place. With leave of the Attorney General, there is a further appeal on law to the House of Lords.

Justices, both at Quarter and Petty Sessions, may be required to "state a case", that is, set out the facts, the arguments and the grounds of decision, for the opinion of the High Court, usually taken on the Crown Side of the King's Bench Division. The decision is final.

There is also an appeal from the decisions of courts of summary jurisdiction to Quarter Sessions, limited, where guilt has been admitted, to the sentence. The Quarter Sessions rehear the whole case ; it is not restricted as are appeals to

the King's Bench Division by "case stated", to points of law and to the acceptance of the facts stated. A special committee of Quarter Sessions of not less than three or more than twelve persons hear the appeal. In appointing members of the committee Quarter Sessions, so far as practicable, select justices having special qualifications of the hearing of appeals, and for appeals against decisions of juvenile courts, justices specially qualified for dealing with juvenile cases. The appeal committee, like Petty Sessions, may state a case to be decided upon a point of law by the King's Bench Division.

The Criminal Justice Act 1948 contains many minor amendments of the law with regard to criminal procedure too technical to be considered in this short treatise.

CHAPTER VI

CRIMINAL PROCEDURE

"In ordinary language," wrote Blackstone in the Eighteenth Century, "when we speak of crimes we understand such only as are the subjects for Indictment"—a view which would hardly be held to-day when over eighty per cent. of criminal offences are dealt with summarily by the magistrates. As the Courts of Oyer and Terminer and General Gaol Delivery (which have already been mentioned) date from the time of Henry I, and the Justices of the Peace from the reign of Edward I, it must have been that in the interval committals for trial at the Assizes were exercised by the Coroner or by the old Court Leet or Frank-pledge, dating from Saxon times, their business, among other matters, being "to present by jury all crimes within their jurisdiction"; they were the freeholders within a particular hundred or manor. Later, their business came to be exercised by the Justices and the Court Leet is now obsolete.

Thus it is, in considering proceedings by indictment, that we have first to consider the part played by the committing authority, now almost always a Justice or the Coroner.

The action of the prosecution in an indictable case (save those which are tried summarily) may begin with an arrest or by an "Information" which may precede the detention of the defendant.

As to arrest without warrant, the powers given depend in part on the old distinction between felonies and misdemeanours; for, in the case of treason, felony or dangerous wounding, a private person, if the act is committed in his presence, is required by law to arrest, and, if the crime is otherwise, a person has the right, though not the obligation, to arrest if he has reasonable ground for suspicion. A person who is not a policeman may also arrest a person whom he finds committing certain offences under the Larceny or Coinage Offences Acts and certain other indictable wrongs, if done by night. A police constable may arrest also for breach

of the peace, which is a misdemeanour, or for loitering or on suspicion that someone is about to commit a felony or, in London, persons loitering at night. In the case of arrest by warrant, a sworn information is necessary, but the justice, in his discretion, may issue a summons rather than a warrant.

Historically, a Felony was a crime which involved the forfeiture of property, lesser crimes being called Trespasses, or merely "offences". The phrase "Misdemeanour" is of later date. The penalty of death became generally attached to conviction for felony, which penalty was gradually reduced by statute and mitigated by such devices as "pleading benefit of clergy", and by substituting transportation as a punishment, until, to-day, apart from Murder, Treason, Piracy and setting fire to His Majesty's ships, capital punishment has been abolished. Forfeiture of property in case of felony was formally ended by an act of 1870.

Yet the distinction between felony and misdemeanour still obtains for several purposes other than arrest. Only in felony, for example, are "accessories after the fact" criminally liable; that is persons who, knowing a felony has been committed, shelter the felon from justice. A civil action cannot be brought for loss sustained on an injury the subject of felony until after the prosecution; it is otherwise with misdemeanours, and felons may lose certain public and other rights until they are pardoned or the sentence is carried out. Misdemeanours, on the other hand, need special statutory provision to involve such consequences. Finally, Peers charged with treason or felony until 1948 could be tried by their fellow Peers in the House of Lords or before the Court of the Lord High Steward; in both cases the Lord High Steward presided, but in the latter the President need not summon more than twenty-three Peers; in the former while Parliament is in session, all Lords of Parliament were judges. The whole peerage, other than Peers Spiritual, including Irish and Scottish Lords and their wives were so triable. It was not a matter of choice but of status, but the whole procedure did not apply in the case of a crime not being a felony or treason.*

*The privilege of Peerage was abolished by the Criminal Justice Act, 1948.

It is now necessary to consider the "Information" before a magistrate which actually starts the proceedings. The practice for an Information is the same whether the proceedings result in a trial before a jury or a summary hearing. It must contain a statement as to the name and occupation of the party to be charged and the offence, together with particulars of the time and place where the offence was committed.

If arrest be demanded, the Information must be a sworn one, though, in any case, if a summons only be granted and it be disobeyed, a warrant may issue. If the Information be for an offence against the revenue, it must be laid in the name of an appropriate officer or the Attorney General. Certain statutes regulate the requirements of particular informations, as when the consent of the Attorney General is necessary, but, generally speaking, except in the case of a "common informer" (to recover a penalty awarded "to whom shall first inform of its breach"), the Information is laid by a private prosecutor who complains to the police, though the Crown may file an Information "*ex officio*" by the Attorney General in cases of constitutional importance, which will have the effect of commencing an immediate prosecution without the necessity of first going before any committing tribunal. This procedure is, however, very rare; still less frequent are criminal informations by the Master of the Crown Office on the suit of a private person in cases of misdemeanours of magnitude "though not tending to disturb the government". These go to the King's Bench Division accompanied by a motion that they shall be directly heard without committal. Both they and the *ex officio* information of the Attorney have almost fallen into disuse, but might, conceivably, in troubled circumstances be revived.

The Summons, which follows the information, must be "served" on the defendant personally or by being left at his abode, in some cases it may be served by registered post, or by a solicitor.

A justice can issue a Summons for an indictable offence, without an Information, against any person within his jurisdiction charged with an indictable offence and may

compel the presence of witnesses for the prosecution by summons or by warrant in case of disobedience.

Where the defendant is before the Court for preliminary examination (which may be conducted before one magistrate), it is not necessary that the justices should sit in "open Court", since they are not exercising a summary jurisdiction, though if the defendant elects to be tried summarily and may be and is so tried, it is otherwise. The case is opened by the prosecution, his witnesses are examined as in the case of civil proceedings, by examination, cross-examination and re-examination, but in every case the evidence is written down by the clerk to the justices. The prosecutor may sum up the evidence and the charge will then be read to the accused, and, if necessary, explained to him. The defendant then has an opportunity to speak, he need not, if he does not wish to, but may "reserve his defence". He may give evidence on oath and call witnesses. All evidence on his behalf is also taken down in writing, and these "depositions", like those of the prosecution, are then read over to the witnesses and, when agreed, signed, and counter-signed by the chairman of the justices. If the defendant has a legal representative he will normally address the Court before he calls the witnesses, unless the defendant is alone giving evidence, when the advocate follows. A person charged with an offence before a court of summary jurisdiction or his counsel or his solicitor is entitled to address the court either at the conclusion of the case for the prosecution or at the conclusion of the evidence at his discretion; and where oral evidence is given by witnesses for the defence in addition to the evidence of the person charged, the court may allow him or his counsel or solicitor to address the court both at the conclusion of the case for the prosecution and at the conclusion of the evidence, but in that case the prosecution are entitled to the right of reply. The prosecution are not entitled to the right of reply upon the trial of any person on indictment on the ground only that documents have been put in evidence for the defence.

At this stage the justices must decide whether there is a case strong enough to justify committal. Special provisions

apply to persons under 14 and 17 years of age respectively.

If there is more than one justice sitting the majority decide. The question to be determined is whether there is a *prima facie* case to be answered. If it is decided to commit, the question arises is to what court and whether Bail should be allowed. Bail is the conditional release of a person detained in custody pending the hearing of the charge against him, or his appeal against conviction. It is granted only if the prisoner, or someone on his behalf, is able and willing to enter into surety which will be forfeited if he does not appear at the trial (or at the hearing of the appeal). In the case of a pending trial, Bail is normally granted, but it is at the discretion of the magistrates, who should refuse it if the seriousness of the charge requires or where there is reason to suppose that the accused may abscond or continue in his course of crime. Magistrates should be slow to grant Bail if it is opposed on adequate grounds by the police. By recent legislation a prisoner may be committed to a court in any place where he was apprehended or is in custody, or appeared to a summons as if the offence had been committed there, unless he can show hardship ; on this point there is an appeal to the High Court. The case must be sent to Quarter Sessions, if within their jurisdiction, unless there are special reasons for sending it to the Assizes, such as that the Sessions will not sit for over a month. The Quarter Sessions are incompetent to try Treason, Murder, Felonies involving penal servitude for life on a first conviction (with certain exceptions), perjury, bigamy, libel, conspiracy, forgery, and certain sexual and other offences.

As to Bail, which may be given on remand during the preliminary enquiry as well as after commitment ; in the case of Treason, this can only be granted by a Judge of the High Court or a Secretary of State. Formerly the Justice was bound to grant bail in case of misdemeanours, but his discretion now applies to them as well as to felonies. Excessive bail is forbidden by a statute of William III and in case of refusal of bail the Judges of the High Court can grant it on the ground that an appeal has been entered or for other reasons. In the case of misdemeanour, the justices must

inform the prisoner of this fact. The prisoner will generally be required to produce sureties, but this requirement may be dispensed with if the magistrates think it will defeat the end of justice. "Recognizances" of the accused and his sureties that he will appear at the trial and surrender are taken, as also of the prosecutor and witnesses. A recognizance is an agreement to admit that a certain sum is owing to the Crown to be payable unless the party, as prosecutor or witness, appears at the Assizes or Sessions. If he fails it may be "estreated", seized by the Sheriff. Some witnesses, whose attendance may not prove necessary, may be bound conditionally to attend the trial.

If the information or complaint in criminal proceedings may be regarded as comparable with a writ, the indictment may be said, in defining the issue, to take the place of pleadings, with this distinction that the defendant in crime is not required to formulate his case and no admissions, express or inferrred (other than confession) can be used against him. In other words, with few exceptions, such as being found with burglarious tools by night, the whole burden of proof rests throughout the proceedings with the prosecution, and the accused is entitled, unless the case against him is established beyond reasonable doubt, to be acquitted.

But in the first place, before any proceedings can be pursued against him, it is necessary, both at Assizes and at Quarter Sessions, i.e., wherever the proceedings take place before a jury, that an Indictment should be formulated. The Indictment, if in order, is signed by the Clerk of Assize, or in the case of Quarter Sessions by the Clerk of the Peace. Since the abolition of grand juries who had to find a "true bill" to present to the petty jury, a method in existence since the time of Henry II, the Judge or Chairman of Quarter Sessions may quash the Indictment if the person charged has not been rightly committed or may quash such articles called "counts", as have improperly joined in the same Indictment or for other irregularity. For Treasons committed outside the King's dominions, and certain other offences committed abroad a grand jury may still be empanelled in the Counties of London and Middlesex.

The commencement of the Indictment must state the place of jurisdiction, and the counts, each being for an offence charged, must be in paragraph form. Next follows the statement of the offence, followed by the circumstances of the crime alleged. The count must be sufficient to inform the defendant of the crimes alleged, but must not be too general or vague. The party indicted, the party complaining, and the particulars must be given. It is sufficient for this purpose to describe any place, time, thing, matter, act or omission in ordinary language, in a manner as to indicate with reasonable clearness the matters relied upon.

The Indictment having been read over to the defendant, it becomes his duty to plead to it; if he stands mute, and this is found to be "of malice", he will be treated as having pleaded not guilty. He may also object to the jurisdiction of the Court or the validity of the Indictment, but if he does plead, he may either aver that he is "guilty" or "not guilty". In the latter case there follows the trial.

This takes place before a jury made up of twelve persons chosen from a panel of some forty to fifty persons. The right of the accused to challenge jurors without cause is now limited to seven. After this has been disposed of, the jury are sworn and, in felony, the indictment is read over to them. An opening speech for the prosecution follows, and generally, unlike a civil case, counsel should do no more than place the case before the jury and not press for a verdict. The witnesses for the Crown are then called and examined as in the case of civil cases. When the Crown have closed, the defendant may submit to the Judge that there is no case to go to the jury. If the Judge rejects the submission, the defence then open their case. The defendant may now give evidence on his own behalf and call witnesses as to his character. If counsel is representing the accused, after he has summed up the case for the defence, where no witnesses are called other than the prisoner and those to character, the counsel for the Crown may, if there be fresh evidence adduced, make a second speech, but the final reply is with the defence, save when the Law Officers are present and claim it. Where the defence call witnesses or give evidence other than the accused him-

self, these are called and examined. The defendant may make a second speech and the prosecution a final address.

Next the Judge sums up the case to the jury, he tells them of the law and may comment on the evidence. The jury then return a verdict of guilty or not guilty. They must be unanimous.

There are certain pleas which the prisoner may make which, if upheld, prevent the charge proceeding. They are that he has already been acquitted for the same offence (autrefois acquit) or that he has already been convicted (autrefois convict), and he may also plead that the Court has no jurisdiction, as if Quarter Sessions were to attempt to try a man for murder, or that the indictment is defective. This last plea was formerly very effective in many cases, but now there is considerable power in the Court to amend indictments, not always to the advantage of justice, as it may be said that the prisoner is entitled to know beforehand what he has to meet; adjournment may sometimes correct any possible hardship. In libel he may by special statute plead "Justification", that what he wrote was true, this he may plead also "not guilty".

If, on a plea of "not guilty", the jury reject the plea and declare for the prisoner's guilt, or when the accused pleads "guilty", it becomes the duty of the Judge or Quarter Sessions to pronounce sentence.

The laws of evidence, which have been discussed when dealing with civil procedure, including the application of presumptions of law and fact, require special attention in criminal cases. As a general rule it may be stated that the presumption is against the commission of a crime. To justify conviction the offence alleged must be proved "beyond reasonable doubt"; similarly there is a presumption against immorality and, generally that legal acts have been done properly and, most important, that a person normally intends the natural consequence of his acts. As has been judicially stated, "Presumptions of guilt mean no more than from the proof of certain facts a jury will be warranted in convicting the accused of the offence with which he is charged".

Turning to evidence of particular concern in crime

(though often applicable in civil as well), we note first the evidence called "real", being the actual material thing from which inferences may be drawn; secondly, oral or written; thirdly, direct or circumstantial, the latter being more inferential in character: from which it follows that circumstantial evidence, though often of great importance, must always be accepted with great caution and must be relevant to the facts in dispute—the lack of motive for the commission of a crime is a good example of circumstantial evidence, false statement may be another or the consideration of subsequent conduct. Nevertheless, while the law does not require in terms that circumstantial evidence be confirmed by direct, there cannot be a conviction for larceny without proof that theft has actually taken place, nor for murder unless it is first established that there has been a death.

An important distinction between civil and criminal procedure is that in the former case, as has been said, admissions as to facts may be made in the pleadings or by specific admission or at the trial, whereas in criminal issues everything must be strictly proved.

Since 1898, accused persons may give evidence on oath. The act permitting this forbids counsel to refer to the fact that the accused has declined to give evidence, but the fact that he has not done so may well affect the mind of a jury. If the prisoner does give evidence as to his good character, he may be cross-examined on the matter, but generally his character is not relevant. So also an accused person who elects to give evidence cannot be asked a question to show that he has committed or been convicted of any offence other than that with which he has been accused, unless it is necessary to prove that fact as a part of the evidence of the offence with which he is charged. After conviction, however, evidence may be tendered of previous convictions as a matter influencing punishment. There are a few cases where it is necessary for the prisoner to prove his lawful purpose, such as being in possession of explosive substances under suspicious circumstances, being found by night in possession of housebreaking implements without lawful excuse and, in

the Metropolitan Police District, being in unlawful possession of goods reasonably suspected to have been stolen.

Otherwise, as has been said, the burden of proof is on the prosecution, but it may well be that, having established a *prima facie* case of guilt, as a matter of logical inference it will become necessary for the accused to discharge it by contradicting evidence; this is, however, rather a matter of influencing the jury or justices in their final conclusion than of any strict rule of law. Confirmation may arise through silence on the part of the defendant or an omission to do what may reasonably be expected to be done, but this, again, is a matter of reasoning rather than of proof as such.

As a rule, evidence of facts similar to those relied upon is not admissible as relevant, as in the case of past convictions, unless the similarity of the facts is relevant to the matters in issue and not merely to show the bad character of the accused. In certain cases evidence by certificate is admissable.

A jury or justices must not find guilt unless they are satisfied beyond reasonable doubt; the very gravest suspicion is in itself not enough. In certain cases, corroboration is necessary, as in Treason, where the evidence of two witnesses is required. In Perjury, also, there must be corroboration, so also in the case of certain sexual offences and, where a child is not capable of being sworn, corroborative evidence is necessary.

Moreover, in the case of Hearsay, there are certain qualifications in criminal cases; such as the dying declarations of men who have been killed as to the cause of their death. Depositions made before a justice may be *prima facie* evidence, if the witness has died or become insane or too ill to appear; so also complaints made after certain sexual offences may be corroborative evidence as also may be evidence of general good character. Previous convictions may be proved by fingerprints.

The admission of guilt made by the accused, called a Confession, is only evidence if given voluntarily. Unlike a civil case, the admissions of the defendant or of his agents against the interest of the party accused, are not admissible. No inducement may be made to obtain a confession, neither

a threat of evil or a promise of good, but a police officer may ask questions of a person whether suspected or not, but when he has made up his mind to charge a person with a crime, he must first caution him that his evidence may be used at the trial.

Not only the prisoner but also the husband or wife is now a competent witness for the defence, but only on the application of the accused. They cannot even then be compelled to give evidence. If tendered, the prosecution gets the right of reply, as in any case of a witness called for the defence other than the accused.

In summary cases in addition to the prosecution the defendant has a right of reply if he calls oral evidence other than his own.

Finally, as a matter of criminal procedure, it is to be noted that it is not every indictable offence which is heard at Assizes or Quarter Sessions. With the consent of the accused, in a number of crimes under the Larceny Act, Malicious Damage to Property Act, Coinage Acts and other statutes, the case alternatively may be dealt with summarily. The request for summary trial by the prosecution must be considered, and also the nature of the specific charge, the character of the accused and, generally the Bench may exercise their discretion. If they decide to try the case, the procedure is similar to that in other summary proceedings. If the case is one brought by the Director of Public Prosecutions or one affecting the Crown or a local authority, the consent of the prosecution is essential. Conversely, in certain cases not normally triable by indictment, where a sentence of more than three months can be imposed, the defendant can claim to be tried by a jury and must be informed of his right so to be. A person tried summarily for an indictable offence may nevertheless be committed for trial for more severe sentence if of seventeen years of age.

CHAPTER VII

COSTS, EXECUTION AND PUNISHMENT

(*a*) *Costs*

THE "Costs" which have to be paid by the losing litigant to the victorious one cover normally only so much of the expense of litigation as is ordered to be paid by the Court, as ascertained by the appropriate officer, from one party to another. Such costs are not ordered as a matter of right, but are discretionary, though as a rule, they "follow the event", as it is said, that is they are generally given to the litigant who wins the action. This is particularly so where there is a jury, and in such a case, if any other order is sought to be made, a special application should be made to the Court. Costs were first made payable to the plaintiff by an act of Edward I, but it was not until the time of Henry VIII that the victorious defendant was put in a similar position. There are special provisions that, when the action is brought in the High Court and no more recovered than might have been had in the County Court, in cases where the County Court has jurisdiction, the plaintiff, as a rule, will only obtain costs on the County Court scale—a scale which itself is divided into classes of graduated amount.

The order of the Court usually requires that the costs be "taxed", that is to say the amount which the unsuccessful party has to pay his opponent is thereby limited according to certain defined principles, a work undertaken by the Taxing Master. If a special order is made for costs, to be taxed not as "between party and party" (the normal method by which the loser must pay a sum to the victor which represents what it would cost to conduct the case if the work had been done as cheaply as possible) but as between "solicitor and client", the amount payable by the defeated opponent may be much more, namely, the amount the solicitor might reasonably pay out in the conducting of the action.

In Chancery the costs have always been in the discretion of the Judge, but the discretion which we have mentioned in the common law is of comparatively late growth. Before

the seventeenth century, legislation had given the successful party his costs automatically, as a matter of right. In the County Court, the Registrar is the Taxing Officer.

The position as to Costs may be affected by "payment into court". As a rule if the defendant pays an amount into court and the plaintiff takes it out in satisfaction, he gets his costs so far incurred, but if the plaintiff goes on and recovers no more than was paid in, he is only entitled to his costs up to the time of payment in. Costs may be general or ascribed to separate issues in the action which, as to costs, may be divided. The Court of Appeal and the House of Lords also have a discretion as to costs, both as to the hearings before them and as to the courts below.

When the plaintiff resides permanently abroad and has no property in England, the defendant may ask the Court of first instance for security for costs and on appeal the power to order security is much wider.

The above observations as to costs lead to the consideration of the position of poor persons who cannot afford either to start or defend an action and to their financial position in criminal cases. Instances of paupers appealing to the Judges on circuit appear as early as the thirteenth century and in Henry VII's reign, the Lord Chancellor was entitled to give writs and assign counsel and attornies to poor persons who were plaintiffs. The means of dealing with a poor person who failed in his suit was by "punishment thought reasonable."

As has been said, it was not until the reign of Henry VIII that a defendant in a common law suit could obtain costs in any event, even against a solvent person. In Chancery, where the matter was always discretionary, there was a right to proceed in *forma pauperis*, though appeals could not be so brought. The ecclesiastical courts also allowed causes in *forma pauperis*. Finally, in 1883, Rules of Court were formulated for poor persons cases in the High Court. The poor person had to be worth no more than £25 to avail himself of the procedure, and an opinion of counsel and a declaration on oath by the applicant or his solicitor were necessary. The House of Lords has its own rules ; it can grant an appellant leave to plead in *forma pauperis* and thereon no fees need be

paid nor the usual security given. If the pauper fails he cannot be made liable for costs ; if he wins he can recover a part of the solicitors' out of pocket expenses and profit costs, excluding counsel's fees.

The Poor Persons' Procedure, which, since 1914, exists under rules of the Supreme Court, depends upon the work of unpaid solicitors and counsel who report to the Court, whereupon a certificate that the case should proceed may be granted, in practice by the Poor Persons' Department. The applicant may usually not be worth more than £50, or £100 in special cases, but there is no fund for financing the case properly to obtain evidence and the like. In 1947, 95 per cent of the cases were matrimonial. Nearly all persons in employment were ineligible.

The position in criminal cases is somewhat more favourable to the impoverished. There the old custom was that the Judge could ask any barrister in court to defend a prisoner. If the accused could produce £1 3s. 6d. he could choose his own counsel. By the Poor Prisoners' Defence Act 1930, any person committed for trial for an indictable offence may apply either to the magistrates or at the trial for a certificate, if his means are insufficient to enable him to obtain legal aid. In case of a charge of murder, the certificate is always granted ; otherwise the question has to be considered from the view whether it is desirable in the interests of justice.

The poor person, on receiving the certificate, becomes entitled to counsel and solicitor and to a copy of the depositions and an allowance for certain other expenses properly incurred in carrying on the defence. The cost is placed on the local public funds. Legal aid may also be granted on appeals under the Criminal Appeal Act, 1907, and must be so granted in the case of a charge of murder.

There is no provision for legal aid in the County Court, save in those causes which have been remitted from the High Court, and though at one time it was thought, erroneously, that a person should proceed there in *forma pauperis*, the Court of Appeal, in 1922, decided otherwise. There is no provision for aid in civil proceedings before the magistrates, save that, in matrimonial and domestic cases, the justices

may excuse the small costs of the Summons, so that, in courts exercising summary jurisdiction, as in the County Court, there is no public provision to meet the civil expenses of the impoverished litigant.

Were it the fact that the only necessary cost of placing a claim before the Court or defending it was the retaining of an advocate the matter would be serious, but it is often overlooked that the more intractable difficulty is to obtain evidence and, generally, properly to prepare the case for hearing. That it is a requirement of justice that it should be accessible to all is a commonplace, and in a technical sense, English law protects that right, but when it is realized that even a simple case in the High Court often costs the parties several hundred pounds, whoever ultimately has to pay, and that, even in the County Court, there are few actions which can be fought for less than fifty, it will be understood how not only the very poor, but even people of moderate means are often prevented from having their claims and defences adequately considered. In the absence of any provision by society as a whole adequately to deal with this matter, in the case of the poor in certain towns organizations have been founded to give advice or even assistance, but from any point of view these charities cannot adequately deal with the problem.

For workmen and for some professional and business people, trade unions, friendly societies and like associations provide legal aid and conduct actions or advise in matters connected with the functional activities of their members. Insurance companies and Marine Underwriters have, of course, a direct interest in fighting and defending actions. Citizen's Advice Bureaux are also active and are in close touch with the Law Society. The Armed Services set up legal aid services to deal with the difficulties confronting their members.

Under the Poor Persons' Procedure Rules, unless the Court orders otherwise, neither a poor person nor his opponent receives costs, though the Court may order the moneyed opponent to pay out of pocket expenses or, if special circumstances arise, certain costs other than counsel or court fees.

The unfortunate solvent litigant who wins, notwithstanding that the examining committee have recommended an action to the poor person, is without a remedy.

The practice of refusing fees to Counsel in poor persons' retainers does not, of course, apply to people of slender means who are not technically poor persons. They may even be able to afford the services of a junior of small standing; to be confronted, perhaps, with a leading King's Counsel. Then again the rich can afford to appeal, though now to the Lords only with leave, but to the Court of Appeal as of right from a final determination. Interlocutory proceedings, such as interrogatories or commissions to examine witnesses abroad, are luxuries which the wealthy can employ at the expense of their poor opponents and indeed, until the whole standing of the citizen before the law has been rectified, it is but thoughtless complacency to talk of equality before the law. As a witty Judge once put it: "The Courts are open to everyone, like the Ritz Hotel"!

It is feared that the pressing problem of legal assistance to the very poor has excluded from consideration the greater difficulty of relating all legal procedure to financial expense. Even in the case of the wealthy and victorious litigant it may well happen that his judgment will prove worthless through the defendant becoming bankrupt, but the greatest difficulty has still to be mentioned, namely, that the Court through a deficiency of evidence due to financial stringency may never have before it sufficient material to enable it to come to a sound decision.

In the higher tribunals, at any rate, the Judge can often supply of his own knowledge argument and authority not adequately stated by inexperienced counsel, but there is no substitute for a deficiency of factual matter.

The great increase of the activities of the State has accentuated the problem, for the Crown, quite apart from its immunities to discovery, has an immense advantage over the private subject.

In this book it is not proposed to propound a remedy; it is sufficient to indicate some of the financial difficulties, inevitable it may be in the present method of litigation, which

impede full justice being done to every case. Obstacles which apparently were unknown to, and certainly did not disturb, the fathers of the law.

The question of costs in criminal law has followed a different course than in civil actions where, as a rule, the costs "follow the event". Whether a prosecution was started by the Crown or the Crown has been moved to prosecute by a private person, at common law, as was the case in civil matters, no costs were taken or given, but the statutes as to costs which have been discussed in civil matters do not apply to criminal proceedings, and a different series have dealt with them. By the Costs in Criminal Cases Act, 1908, costs on a scale fixed by rules made by the Home Secretary may be given at Assizes or Quarter Sessions to the prosecution and also for witnesses for the defence in the case of indictable offences, to be paid out of public funds, so also, in the case of indictable crimes dealt with summarily, the Justices may give a certificate for costs. In certain cases the courts may order the defendant or the prosecution to pay costs if they fail, and this power to make the parties pay has recently been given to all criminal courts. In cases of criminal libel the defendant, if he fails, may be ordered to pay costs, but this is an exceptional provision in the case of indictable offences. The Justices on the preliminary examination may direct the costs of the prosecution or defence to be paid for out of County or Borough funds. Some costs are only recoverable as a civil debt and special provisions under particular statutes, together with limitations when fines are less than a certain amount make the whole matter a very intricate one which can scarcely be discussed here in detail. The amount of the costs is fixed by orders and regulations and also that of Court Fees. A Summary Court has no power to leave it to the discretion of the Clerk to the Justices to fix the amount of special costs out of court. The Court should fix such sums before the entry is made in the Court Register. The amount of the costs must be fixed by the Justices themselves at the time they adjudicate.

(*b*) *Execution*

The judgment of a court having been delivered, it becomes

necessary, if the victor wishes to enjoy the fruits of his success, to enforce it. This process, known as "Execution", will operate not only for the amount actually ordered to be paid or other remedy prescribed, but also for so much of the costs incurred as may be laid to the account of the defeated litigant. An execution for whatever sum may ultimately be found due is usually enforced in civil actions by a writ commanding the Sheriff to cause to be paid out of the goods and chattels of the judgment debtor the sum recovered with interest. The Sheriff may seize the goods and sell them (save clothes, bedding and the tools of the defendant's trade), indeed everything except a freehold estate. Generally speaking, this writ, known as *fieri facias*, only enables the Sheriff to sell; if there are no buyers, a further writ is necessary at the suit of the creditors to dispose at all hazards. As to recoupment from freehold land, this is effected by a writ of "Elegit", vesting the legal estate in the creditor to cover the claim, if the land be taken into execution by the Sheriff. The writ dates from the time of Edward I. Government stock and that of companies may be "charged" by order with the payment of a judgment debt, and a Garnishee Order is appropriate when the property to be charged is in the hands of a third person who only claims to hold it for another. After receiving the order the garnishee is prevented from parting with these monies to the judgment debtor until a final order is made, but on the order "nisi" the garnishee may object that he is not liable to be garnished.

Another writ, the "Writ of Possession", issues when the plaintiff has been held entitled to the possession of land: it requires the Sheriff to enter the land and give the plaintiff the possession. Similarly there is a "Writ of Delivery", where the defendant has been ordered to hand over some specific chattel to the plaintiff. A receiver may be appointed to administer a fund in court by way of equitable execution, that is execution which would have been enforceable in the old Chancery Court, and, generally, a person failing to obey the order of the Court, as when restrained by injunction, may be guilty of "contempt", for which "attachment", a detention of the person—indefinite in time—may follow. An

open insolence in the face of the Court, a refusal by inferior courts to obey direction, a refusal of jurors or witnesses to appear when summoned may all be contempts as well as disobedience to an order or decree. The Court may authorize the immediate apprehension of one committing contempt in *facie curiae*, that is in open court, otherwise it will hear the matter argued on affidavit. The duration of attachment is in the discretion of the committing judge. Persons detained for contempt are treated as offenders of the first division ; they may remain in custody until the contempt is purged. A complementary writ, much used in the Chancery, to that of attachment is the "Writ of Sequestration" of an estate. Both are used to enforce the special orders in Chancery, other than ordinary Common Law judgments for money or land.

It is doubtful whether courts which are not "of Record" (that is where the proceedings are not enrolled"), such as the justices, have the power to commit, but a disrespectful behaviour in the face of such a court is certainly an indictable misdemeanour.

As to Summary Courts, if the sentence is a fine, the enforcement of this and of damages awarded may be by distraint under warrant of the Justices and not by the Sheriff. This remedy is distinct from any power of imprisonment for non-payment of fines which they may possess.

There are two matters affecting acts done abroad ; in civil procedure the enforcement of Foreign Judgments, in criminal Extradition, which merit special mention. As to judgments obtained in foreign or colonial courts, if such judgments finally and conclusively establish a debt between the parties, such debt can be recovered in an action in England, though it is otherwise with regard to claims for injury or land, which can be claimed on a specially indorsed writ without further statement of claim. Foreign judgments can also be pleaded by way of defence. Foreign judgments against ships may also be valid in England and, if given by a recognized Court of Admiralty abroad, are enforceable here. So also a foreign decree of divorce abroad may be recognized in England if given on grounds recognized as sufficient in English Law.

In the case of crime, it is a principle of international law that, as a rule, there can be no prosecution for offences committed outside jurisdiction, though, by statute, a British subject can be tried in England for homicides committed overseas. Recent cases in Treason out of the realm may also be an exception, as is Piracy. In order, therefore, that crimes committed in one country by persons who have fled to another may not go unpunished, by agreements known as Extradition Treaties, fugitives may be apprehended, save for "political" offences, and brought back to the country where the crime was committed in order to stand their trial. In England, the Home Secretary exercises the power by warrant, after a preliminary inquiry by a special Stipendiary magistrate. A similar provision exists by statute as regards the British Empire, the Fugitive Offenders' Act, 1881. There is also a power given to the Home Secretary under the Aliens Orders to order an alien to leave the realm. This may be done if the Minister thinks it to the public good; he also may act, if a court makes recommendation because of previous convictions as provided in the Order. The common law prerogative of the Crown still allows the expulsion of aliens from the realm; conversely the Crown, by writ of "Ne Exeat Regno" can restrain all persons from leaving the kingdom. This writ is now only used to prevent a party to an action withdrawing himself or his property from jurisdiction.

(c) *Punishment*

The consequence of conviction in a criminal case is, generally, punishment, which may always be remitted by the Crown by pardon or reprieve, though since Stuart times the Crown cannot prevent trial by impeachment but may still remit the sentence.

By the Criminal Justice Act 1948, the distinction between Penal Servitude and Imprisonment is abolished and the power to order a sentence of whipping generally removed.

Apart from cases such as treason or murder by persons over 18 years of age, where the death penalty must be pronounced, in the great majority of offences a maximum sentence is laid down, leaving it to the discretion of the

Court to decide the actual duration of the imprisonment or the amount of the fine.

In the case of those under eighteen, in lieu of sentence of death where still otherwise enforceable, the convicted person is to be detained at His Majesty's pleasure and no person under seventeen years may be imprisoned by a court of summary jurisdiction, nor a person under fifteen by any other court.

Fines may be imposed on conviction for felony. In certain cases offenders under twenty-one and over sixteen may be given "educative" treatment in Borstal institutions, and for older offenders over the age of thirty, the Court may add (in the case of there being three previous convictions) found to be "habitual offenders" by the jury, additional detention for not less than five or more than fourteen years. There is also a power to order "corrective training" for not less than two or more than four years for certain persistent criminals.

Young offenders may be placed in detention centres from fourteen to twenty-one years of age and, when committed for trial be detained temporarily in special remand homes.

Speaking generally, no specific principle can be found on which the degree of punishment and its nature can be determined. Previous record and age are relevant considerations, but not, as a rule, the wealth of the defendant in cases of fining. In all courts time may be given to pay in proper cases and on failure an investigation of means ordered. The Court of Criminal Appeal has from time to time endeavoured to suggest considerations which should influence Judges and juries. As Lord Hewart has said, the interests of the State and the individual have both to be considered; to quote Lord Haldane: "The attitude of the judge must be a detached and impersonal one. He must hold the balance between the right of society and the title of the individual to have all circumstances considered. He must bear in mind the aspects of expiation, of redress and of reformation, and he must not be deterred from doing so because in the individual case these may seem to conflict".

The Courts also, when they think that it is inexpedient

that punishment be actually inflicted, may release or abstain from fining the offender on his entering into recognizance, i.e. undertaking to be of good behaviour and to appear for judgment within three years if called upon so to do; conditions may be laid down as to residence, entering a home, (special hostels and homes are now provided), leaving the country and other matters, and the defendant may be placed under the supervision of a probation officer. In the case of summary jurisdiction, a conviction need not be recorded. Attendance centres may be set up to detain young offenders for specific hours and tasks. Persons found to be of unsound mind may receive special treatment, and when an offence has been committed, a medical examination may be made. Convictions which precede probation orders in certain courts are not deemed to be convictions for any other purpose, unless the offenders are subsequently sentenced.

A previous conviction (which may be regarded after a finding of guilty in relation to punishment) may now be proved by a certificate from the governor of a prison or remand centre of the Commissioner of Police. Also by finger-prints which may be taken when anyone not less than fourteen years is charged with an offence before a court of summary jurisdiction. The prints must be destroyed if the person is acquitted.

In deciding on the particular punishment to be inflicted in a particular case, judges and justices necessarily act administratively as guardians of society rather than judicially. Having decided, either with or without a jury, that a crime has been committed, it still rests with them, in most cases, to exercise a discretion, and, as has been shown, there is a number of ways in which the discretion can be exercised. In modern times the underlying purpose may be said to be reformation rather than retribution, the nature of possible deterrence and the circumstances of the crime being considered. The law, as such, can give little assistance in this matter, and different judges may take varying views as to the penalty for a specific crime, an unavoidable discrepancy which is at variance with that objective certainty which the law should always strive to accomplish.

CHAPTER VIII

ADMINISTRATIVE AND OTHER TRIBUNALS

(*a*) *Administrative Tribunals*

No account of the modern administration of Justice in England would be adequate which did not take account of the very many tribunals, constituted under Acts of Parliament or regulations made thereunder, and are thus a part of the judicial system which exercises great and growing powers of determining rights in many departments of national activity, more particularly in the province of the determination of rights of private persons to social relief from the State. The fact that most of these claims to benefits or compensation are unenforceable in law does not make the duties of the "administrative tribunals" any the less important. The Master of the Rolls (Lord Greene) in his Haldane Memorial lecture, 1944, speaks of "The establishment of special tribunals to deal with questions to which they give rise". He comments ; "A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this, the law becomes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law by which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so. There are, of course, and have for long been statutes of various kinds imposing such duties upon the judges. One example is to be found in what are popularly known as the Rent Restriction Acts under which wide discretionary powers are given to the courts in the matter of ejectment. Another example is the Inheritance (Family Provisions) Act under which the court is empowered in effect to make a new will for a testator who has for reasons which seemed good to himself omitted to make provision for his dependants. A judge does not find it easy to deal

with this type of jurisdiction since he is necessarily affected by a sense of the fallibility of his own ideas of what is fair and reasonable; and in cases of the type which I have mentioned the rights which he is asked to confer on one person can only be given at the expense of another. On what principle is he to decide who is to suffer? However, I suppose that the judges are, even in matters which do not in the last resort turn on questions of law, as fair minded as anyone and they can only do their best. The point that I am concerned to make at the moment is that in certain types of legislation questions fall to be decided which are essentially different in character from those which ordinarily come within the jurisdiction of the court. Without desiring to lay down any definite rule I would venture to state as a general proposition that questions which involve the conferring of rights or the taking away of rights on the basis of what a tribunal thinks is reasonable on the facts of the individual case are not in general suitable for decision by a court of law. It is particularly in the sphere of social legislation that this distinction appears to me to be important. Take such a matter as pensions to disabled soldiers or their dependants. The granting or withholding of a pension should depend on careful consideration of the facts of each individual case. Rigidity of administration and reliance on precedent are not suitable features in dealing with such a matter. Wherever a full discretion is given, elasticity is essential".

Speaking of the danger of such tribunals abrogating to themselves powers of legal interpretation, he continues: "However competent a special tribunal may be to decide a question of fact, I have little confidence in its ability to decide a question of law. Although the last thing that ought to be encouraged is a flood of appeals to the law courts, it appears to me on principle that questions of law ought to be decided by the courts and by no other tribunal. Special tribunals may well be as good tribunals of fact as a judge or a jury. Indeed, if they were called "juries" much of the prejudice against them would very likely disappear. Such tribunals have been in existence for years. The best known, perhaps, is that of the Special Commissioners of Income

Tax, whose decisions on fact in general leave little to be desired. But in their case there is an appeal to the courts on questions of law and it is most desirable that the same principle should be followed in the case of other special tribunals" and, as to rights of advocacy, Lord Greene concludes: "There is one further matter in relation to special tribunals which is of importance, namely, the question of the right of a party to be represented by counsel. Attempts have often been made, in some cases (if I recollect rightly) with success, to take away this right. The legal profession has often protested and in doing so has incurred the charge of acting in its own selfish interests. This is an unworthy accusation. The profession knows better than anyone how completely incapable even an educated layman generally is of presenting his own case as effectively as it ought to be presented. The right to be represented by counsel is one of the surest defences of the subject and it ought not to be taken away save in cases of a very simple description: even in those a party should be entitled to have someone to speak for him. I do not suppose that in simple matters like a claim to a pension or a health insurance benefit the claimant is likely to suffer injustice if the right of appearing by counsel is denied. A friendly and informal tribunal is probably capable of ascertaining the facts without the aid of an advocate. But in such cases, the claimant, who may be too ill-educated, too nervous or too incapable of expressing himself to do justice to his case, ought at least to be able to have the services of a relation or friend. All that I wish to say on this subject is that proposals to take away the right of representation should be jealously scrutinized and, except in matters where complications of fact or questions of law are unlikely to occur, strenuously resisted".

Nevertheless, although these ministerial bodies on the whole are concerned with questions of fact, they inevitably have to interpret the powers under which they work, and this, in part, must raise matters of law. It has been decided in the House of Lords that in such proceedings, as a rule, if the applicant's case is properly before the tribunal he has no right of audience or argument, much less of

representation by a lawyer, and, on the decision being given (often on a printed form that the claim has been disallowed, without reasons), unless he can prove some distinct excess or denial of jurisdiction or mala fides, he is without redress.

This consistent and enlarging supersession of legal process, it is to be noticed, has developed side by side with the growth of collectivist activity. The days when litigation centred chiefly around commercial disputes appear to be passing. Just as the older interest in land tenures, which occupied so much of the time of the earlier courts since feudal times, has now become largely a matter of archaic interest, so Victorian industrial competition is in our period yielding to a social condition in which the individual has come to be regarded as a functionary of the State, and this transformation has its effect on the juridical system, but so far no Mansfield has arisen to cope with the new legal situation.

It was doubtless a feeling among the Judges that judicial control was weakening which induced them in Victorian times to extend the Prerogative Writs so as to control local authorities exercising statutory powers, as well as to supervise inferior courts of law. But the powers of the judiciary are always liable to be limited by statute, and it is one of the anomalies of the present situation that no one is more anxious to curtail juridical power than the social reformer. A reading of modern parliamentary debates discloses, even when these enthusiasts are persuaded that some degree of appellate control is necessary, that they nearly always support the device of a special lay tribunal to be appointed and dismissed by the Minister.

The consequences have been serious—the defects of the new tribunals are many ; they are often anonymous, they are usually untrained in the interpretation of the regulations which they have to apply to particular cases, there is no body of law or authority to guide them, no public opinion to criticize their action, and, in the opinion of Dr. Robson (in his work on *Justice and Administrative Law*) they are lacking in a capacity to assess evidence. Most of them have had no training in the construction of legal language, such as may be given by a study of such works as Maxwell on Statutes or Norton on

Deeds, and, above all, their judgments often contain no reasons and afford therefore no guidance to those who seek to dispute them.

In so far as the functions of the tribunals are administrative we are not here concerned with them, but few of their decisions have not also a judicial aspect. Dr. Allen in his work, *Law and Orders*, cites the licensing justices as an example, as also the Traffic Commissioners under the Road Traffic Acts and the Minister on appeal from them. He further points out the very great number of quasi-judicial powers exercised by the Minister of Health, by way of appeal, under the Old Age Pensions, the Blind Persons, Widows and Orphan Pensions and many other Acts. All these functions, he says, are essentially judicial, "for the most part they are handled by special tribunals or Boards of Referees within the Ministry". The same observation may be made of the Industrial Insurance Act which sets up a special appeal authority to deal with matters which formely went to the courts under the Workmen's Compensation statutes. Powers over Doctors under the Insurance and National Health Acts are certainly semi-judicial in character and many more instances could be cited, some of which were mentioned before the Committee on Ministers' Powers in 1929.

Other tribunals, not specifically under ministerial direction until recently included the Railway and Canal Commission, presided over by a Judge of the High Court, the Railway Rates Tribunal, which was also legally a Court of Record, both abolished by the new Transport Act, but replaced by a general Transport Tribunal. The Special Commissioners of Income Tax, the London Building Tribunal, the Registrar of Friendly Societies and, in marine cases, the Wreck Commissioner. All these are directly reviewable as to their jurisdiction by Certiorari and Prohibition save when, as under certain provisions of the Housing Acts, such Orders are expressly excluded.

As to the number, nature and functions of the bodies entrusted with judicial functions, direct or appellate, they will be found so fully and clearly analysed by Dr. Allen in his book already mentioned (though he suggests the whole matter

is a labyrinth) that it would be otiose here to repeat them. Moreover, as they are continually being augmented by the legislature, any catalogue would certainly very soon be out of date.

One thing, however, must be observed, namely, the absence of any duty in all of them to follow precedent must mean that, in their case, the normal historical organic development of English Law is in danger of being superseded—they have no code of laws either, such as is the foundation of Continental jurisprudence ; they are in essence, as Dr. Allen pointed out but an "instrument of policy—a piece of administration in judicial guise" of governmental objectives.

This is not the place to consider the social implications or value of the growth of "administrative law"; whether it is in accordance with the spirit of ultimate justice or not. It is sufficient to draw attention to the vast growth of the numbers, powers and duties of such administrative tribunals and to comment upon the fact that, apart from the comments of the late Lord Hewart and Dr. Allen and many judges, their influence upon the Common Law has been given insufficient attention.

(*b*) *Ecclesiastical Courts*

While the administrative tribunals have been so greatly increasing their powers, the "Courts Christian", as the Church Courts are sometimes called, have been gradually confined to matters solely affecting the Church of England. They are, however, still part of the English juridical constitution and deserve mention in a general work such as this, if only because of the important historical part which they have played in the past in the development of English Law, for, as we have had occasion to remark, until Victorian times the Spiritual Courts were still exercising important jurisdiction in testamentary and matrimonial causes and in certain actions for defamation. Their jurisdiction against brawling and for perjury was likewise swept away in the period between 1850 and 1860.

In later Saxon times, the Bishop had sat in the Shire Moot with the Sheriff and thereafter, adjourning to his Court,

would hear actions where canonists would argue, that is persons learned in Church law. William the Conqueror, however, changed the system; thereafter Bishops were precluded from sitting in the secular Shire and Hundred Courts and, conversely, no spiritual cases were allowed to be entertained by laymen. An excommunication would be enforced, however, by the Sheriff. The Ordeal in civil cases, before its abolition, was placed, as has already been said, under the superintendence of the Church.

An attempt to renew the union of the spiritual and lay courts in the time of Henry I was defeated. This cleavage was endorsed by Stephen and, thereafter, the many matters above-mentioned, as well as those purely ecclesiastical, most of which the Church still controls, remained exclusively a spiritual jurisdiction, nor was this division of function seriously disturbed at the Reformation. The "cognisance of Vice" and "the correction of Manners", remained (and still remains in theory) within the ambit of the Bishops Court, being heard in the Court of the Archdeacon, his officer. This power was mentioned recently in the Court of Appeal, but the latest example of its exercise was in the seventeenth century.

In 1511, there was founded for those who practised in the ecclesiastical courts and for civilian practitioners in the Admiralty and international mercantile affairs an association of Doctors of Law, which conferred the Degrees of Fellow and Advocate, assisted by Proctors, under the approval of the Archbishop of Canterbury. They formed a college which came to be known as "Doctors' Commons" and obtained a monopoly in their own subject. The attempt to spread their habits of law and reasoning, "the common law of almost all Christian opinions," as an enthusiastic supporter in the times of Henry VIII called it, failed against the sturdy opposition of the common lawyers. In 1857, on the establishment of the Probate and Divorce Courts, Doctors' Commons was dissolved, the advocates becoming a part of the general Bar and the proctors' solicitors. The courts which sat at Doctors' Commons were the old Court of Admiralty, the Prerogative Court, which dealt with Probate and the Court of Delegates,

an Appeal Court which was transferred to the Judicial Committee of the Privy Council. The Provincial Court of Arches, which still exists, also sat at the Doctors' Commons.

Coming to the courts which still function, we have to note first the Court of the Archdeacon, now in fact limited to matters connected with the repair of church buildings, next the Bishop's Consistory Court where the Prelate acts through his Chancellor, appointed by letters patent of the Bishop and now generally holding office for life. The Chancellors deal, among other matters, with the issue of "faculties", which are orders of the Bishop allowing alterations in a church and the erection of monuments. The Bishop's Chancellor must be a doctor of civil law or a master of arts ; he may be layman and usually is. He advises the Bishop generally on ecclesiastical law. The Appeal Courts are respectively called in Canterbury the Court of Arches, whose Judge (the Dean of Arches) has absorbed the functions of the "official principal" of the Archbishop in the Province of Canterbury, and the Chancery Court in that of York. Both are now regulated by statute.

By the Public Worship Regulation Act, 1874, the Judge in ecclesiastical appeals is appointed by the two Archbishops, the appointment being confirmed by the Crown. From these Courts a further appeal lies to the Judicial Committee of the Privy Council.

As this book is concerned solely with the administration of Justice in England, the powers of the Privy Council acting through the Judicial Committee to advise the Crown in appeals from the Dominions and Colonies are not discussed, but this same Committee has certain duties to perform within the realm, of which the hearing of final appeals in ecclesiastical causes is one. As stated, by an Act of William IV, it succeeded the old Court of Delegates which dates from the twenty-fifth year of Henry VIII ; it was a special commission appointed under the Great Seal.

The Clergy Discipline Act, 1892, also assigned to the Bishop's Court (the Consistory Court above-mentioned, presided over by the Chancellor) proceedings instituted against

the clergy for immorality and the like; there is an appeal in law to the Provincial Court or the Privy Council at the option of the appellant.

Finally the Public Worship Act, 1874, deals with ritual and ceremonial offences. If the Bishop agrees, the case may be sent direct to the Provincial Court.

The procedure in an ecclesiastical court is by Citation, followed by a Libel, setting out the complaints; this the defendant answers, the plaintiff then pleads "proofs", then follow the defendant's "allegations" and finally the plaintiff's answer made upon oath after which the defendant may proceed to his "proofs"; the pleadings then close. The Court may now summon witnesses and counsel may be heard. Finally follows the Judge's interlocutory decree or sentence which may take the form of suspension, deprivation of an incumbency or, now very rarely, excommunication, which is to-day in effect a finding of contempt. This last process was discussed in the Courts in the "ritual" cases in Victorian times and several clergymen were imprisoned thereunder, for under the Public Worship Regulation Act, 1874, if a clergyman disobeys a monition to cease from unlawful proceedings or from neglect in connection with the fabric, ornaments or furniture of the church or the services, rites or ceremonies, the Judge of the ecclesiastical court may signify the contempt to the Chancery Division of the High Court of Justice and the disobedient person be imprisoned as for contempt.

The refusal of a Bishop to admit the clerk of a patron of a living may be contested in the temporal court by a writ of "quare impedit", for the Bishop to show "why he hindered" the presenter. It is now started by an ordinary writ of summons. If the plaintiff wins, the writ goes to the Bishop commanding him to admit the clerk; the alternative method is the spiritual cause of "duplex querela", appealing from the refusal of the Bishop to the Archbishop, and thence to the Privy Council. All ecclesiastical courts are "inferior courts" in law and liable to be subject to Order of Mandamus, or Prohibition from the King's Bench Division of the High Court, but not, it would appear, certiorari.

(c) *Local Courts*

The Mayor's and City of London Court is an amalgamation of the old Lord Mayor's Court and the City of London Court, formerly the Sheriff's Court, and subsequently in effect a county court. The Court exercises a civil jurisdiction limited to the area of the city. Persons employed in the city are within its jurisdiction. So also a few Borough Courts have survived, the Recorder generally being the Judge, though in the Liverpool Court of Passage, in the Salford Hundred Court and in the Bristol Tolzey Court where the jurisdiction is larger than that of a county court, there are special judges. In the Chancery Palatine Court of Lancaster the Vice-Chancellor of the Duchy is Judge.

The statutory provision that where any action which could be brought in the County Court is brought in a Borough Court and the verdict is for less than £10, the plaintiff shall have no more costs than he would have in the county court, save in exceptional cases, has discouraged the use of the old Borough Courts which in any case, were rapidly becoming obsolete.

A transition from the strictly judicial type of tribunal to the modern administrative one is shown very clearly in the case of the old "Commissioners of Sewers". The work of this Court was to repair the bank of the sea coast and certain rivers ; it dates from the time of Henry VIII and notwithstanding that by modern definition the work of the Commissioners would be almost wholly administrative, they were a Court of Record, could fine for contempt and empanel a jury, as also assess rates to raise revenue for their work. In this respect they resemble perhaps the old Quarter Sessions who, before 1888, were the administrative authority for the County as well as a judicial one.

We conclude our study of inferior tribunals with a mention of the Courts of the Universities of Oxford and Cambridge. At Oxford there is the Chancellor's Court with jurisdiction in civil matters were a resident member of the University is a party. The law applied is the civil law, subject to the jurisdiction of the Vice-Chancellor and rules of certain Judges of the High Court. The criminal jurisdiction exercised

in the Chancellor's court is limited to Oxford and to cases of misdemeanour; felonies were formerly triable before the Court of the Lord High Steward of the University. Cambridge possesses two domestic tribunals which can deprive graduates of degrees and expel undergraduates.

CHAPTER IX

HISTORICAL FORMS OF ACTION AND PROSECUTION

DESPITE the great simplification of the forms of civil proceedings which was inaugurated by the Common Law and Chancery Procedure Acts of the middle of the last century, culminating in the Judicature Act of 1873 and the rules and orders made thereunder, it would be a serious error to imagine that those statutes destroyed the basic principles on which the right to sue even now depends. As much as ever, notwithstanding the disappearance by name of the old writs of action, the common law is founded upon them. Parliament so far has done surprisingly little to tamper with these historical foundations and therefore, even at the risk of bringing what may be called archaic conceptions into the study of present administration of justice, it is wise and necessary to glance at the old writs and the actions emanating therefrom. Indeed, until early in the present century in courts where modern pleading did not apply, such as the Mayor's Court in the City of London, it was still necessary for the plaintiff to bring his action in "debt", in "detinue", in "covenant" and the like, to quote the names of some of the old forms of action which it is proposed now to examine.

It will be recalled that one of the rights of a defendant at an early stage of proceedings is to apply to have them dismissed on the ground that "they disclose no cause of action". What does this mean? It is not every grievance or even every moral wrong for which there is in law a remedy. *Ubi jus, ibi remedium*, where there is a right there is a remedy, is a juristic ideal rather than a fact. From time to time committees of lawyers have been appointed to correct the deficiencies in the system, due in part to the insufficiency of writs or actions in time past. The recent modification of the old rule that a man is responsible for his wife's torts (wrongs) is an example, but, as has been said, there is no better way

of defining the ambit of legal rights in the Common Law, irrespective of those expressly conferred by statute, than to study their origins.

With this apology for so much historical reference we turn to the old forms of writ—the only remedy at Common Law granted by the King, through his Chancery, and dating from Plantagenet times. Actions thus considered were then of three kinds; personal, real and mixed. The personal, now the most important were founded upon Torts, that is wrongs done to an individual for which he personally sought redress (as distinguished from a prosecution by the Crown on his complaint, otherwise in crime), and upon Contracts. There were five writs founded in tort: "Trespass," "Trover," "Detinue," "Replevin" and "Trespass on the Case". Though their actual forms have long since been abolished, most personal actions can be found to have their origin in one or other of these writs and the proceedings founded on them.

The writ of Trespass was one of the earliest and most resembled a remedy in crime. It lay for wrongful entry upon land or wrongful taking and keeping of goods (chattels), or for wrong done against the body of the plaintiff. It had for its basis a claim for damages for wrong done *vi et armis*, that is, as alleged, with actual "force and arms", which allegation, also to be found in the criminal indictments, was increasingly becoming a fiction. The writ of Trespass which appears in the middle of the thirteenth century, added that the act done was "against the peace of Our Lord the King"—again a phrase required in criminal indictments until 1851—once more indicating the early association of Trespass with criminal proceedings. Indeed such wrongs as trespass and assault are still actionable both in civil and in criminal wrongdoing.

In Trespass, damage by direct interference with the possession by the plaintiff of land or goods was considered essential; this requirement severely limited the uses of this ancient action. The wrong must be directly committed, injury merely consequential on the wrong would not be covered. In the case of goods lost by stealing, in very early times the remedy was by action of Theft, but as that

action lay only after the pursuit of the thief or the missing goods had been undertaken, although it extended to any person with whom they might be found, and other obligations were required, such as that of prosecuting the thief, the action of Theft was supplanted by Trespass which had no such limitation.

Trover was an action brought, not for the taking, but the wrongful keeping or "conversion" of another's goods, that is against one who had found them and then wrongfully converted them to his own use. The allegation of finding was later made unnecessary by the Common Law Procedure Act, 1852 (it had long become purely notional) and the action became, as it still is, one for wrongful conversion, but there must be a demand to surrender the goods as well as a refusal to part with them; here the old writ of Trover still affects the action.

The distinction between Trover and another old action, that of "Detinue" is a subtle one. Detinue lay where it was sought to recover a chattel wrongfully detained. The assumption was that the defendant originally came lawfully by the goods, neither stealing nor finding them, but that subsequently, when his right to retain them had run out (as when, for example, a loan was made and he refused to return them) an action in Detinue would arise. The object was restitution rather than damages. The action of Detinue (unlike Trover, which since the seventeenth century had in effect, as we have seen, become an action for the wrongful conversion of goods) was so ancient that the archaic compurgation of the defendant by oath of his neighbours, or by battle, was still a defence. It had developed from the Writ of Debt which we have still to consider. An action first lay to recover a sum of money due and was developed in Detinue to recover a chattel. Moreover, Detinue would not lie for unidentified goods, money or corn, unless marked or contained in a bag, for it was an action for the recovery of a specific chattel.

Lastly, there must be mentioned in Tort the Writ of Replevin. This was originally limited to a claim arising from the wrongful taking goods for distress as for non-payment

of rent, though later it became, to some extent, used as a remedy for the taking of all goods unlawfully. The claim in its essential form was that the goods improperly taken by the Sheriff for distraint should be restored to the owner, with consequential damages.

Passing to the actions founded on Contract, that is breach of agreement between the parties rather than Wrongs as such, we note first the writ for "Debt", above-mentioned, being an action to recover monies alleged to be due from the defendant. Like Detinue, Debt could be met by "wager of law", by battle or compurgation, though in practice this never happened after the twelfth century. The writ of Covenant, where action was founded on a claim for damages for breach of obligation under a deed, a sealed instrument, and "Assumspit" for breach of an agreement not so made, are also of importance, in later days, more particularly the latter, when commerce and industry developed and demanded legal recognition.

Perhaps however, the most important writ of early days is that known as "Case"—a contraction of Trespass *Consimili Casu*—which is an example of an early procedural reform by statute, for, unlike the previous writs considered, it was the creature of an Act of Edward I, though not, apparently, much used until the reign of his grandson. It gave a right of action in cases analogous to Trespass, where injury to person or property was claimed which was not necessarily covered by the earlier royal writs; as when a wrong was not in itself actionable but produced consequences which caused injury. So also when a Trespass failed for want of a corporeal act, so that force was in any case impossible to allege—an action for false imprisonment might be example—and action could not be based on Trespass itself, a suit in Trespass on the Case might lie. Its importance lay in the fact that it attempted to clear the way out of the tangle of procedural pedantries which were threatening to strangle the working of the common law.

Real actions for the most part were abolished in the time of William IV; they were feudal in origin and concerned solely with the recovery of lands and other "realty", as it is termed

in law, but the important "Writ of Ejectment" remained and a similar action is in use to-day where lands and tenements are unlawfully occupied, the writ being the means whereby the landlord may recover possession. A claim for Dower by a widow, and Quare Impedit (which has been mentioned) by the patron of a living refused presentation, also escaped the abolition of other real actions.

Mixed Actions, which added a claim for damages to that of realty, were abolished along with the action on realty.

The development of "Trespass" and "Case" led in the fifteenth century to an action against any man who undertook to deal with the goods of another whereby, through negligence or incapacity, damage was caused. Originally this form of writ, called "Assumpsit" was confined to public duties, one of the earliest cases being that of a ferryman. The contract of Bailment arose upon an agreement that when goods were delivered for a specific purpose they should on completion of the work be re-delivered to the bailor or dealt with as he directed.

Finally, we must consider the wrongs which cannot well be traced to early writs or actions. First, Nuisance, which may be public or private. In its public form nuisance may be the basis of an indictment and falls therefore within the ambit of the criminal law. Private nuisances signify "Anything which worketh another hurt, inconvenience or damage", as obstructing the passage of air or light, making offensive noises or smells, undermining support or releasing water on land. The old Assize of Nuisance, at first available only to freeholders, was developed to include all persons complaining and with the adoption of the remedy of injunction by the common law courts (and now County Courts also) a nuisance may be restrained as well as damages given.

Next, Negligence. It was not until the eighteenth century that an action in Tort specifically lay for failing to do an act not positively unlawful, save for the possible case of negligent guarding of fire, though a refusal by a public officer to do his duty was held actionable as "Trespass on the case" in the famous action of *Ashby v. White* in 1704. The action in negligence may arise in contract and in such case it would

in origin have been a breach of promise to carry out an undertaking and so be supported by the old action of "assumpsit". Actions or deeds were brought in "covenant".

Lastly, of actions not dependent upon the old writs, we may mention Defamation, of which there are two classes, Slander and Libel. Slander, defamation by words, was originally triable in the local Saxon Moot, but later in the Courts Spiritual. It was not until the sixteenth century that actions for words spoken appear in the common law and the ecclesiastical jurisdiction (admitted in a statute of 1315, the Bishop, through his archdeacon being the judge), was not revoked until 1855. In the ecclesiastical courts no proof of special damage was needed, but in the common law it was otherwise, save in certain defined cases. Thus injurious allegations as to the chastity of women needed at common law a special Act to bring them within the ambit of slander (though formerly such words were actionable in London and Bristol). The criminal matter of Slander of the Great (Scandalum magnatum) is now obsolete, and only in Libel (defamation by written word or image) will criminal proceedings as well as civil ones lie. Apart from certain defined exceptions, as for example justification, the defences concerning libel are the same in civil and criminal causes. In the seventeenth century, the Star Chamber, which first dealt with Libel under the royal prerogative, began to award damages as well as punishment, but in the criminal courts, Libel has never been more than a misdemeanour. Prosecutions are rare, civil action the more usual proceeding.

Since the passing of the Judicature Act, proceedings in Equity, other than originating summonses and petitions, have been by writ as in the King's Bench division, but the fact that in former days the plaintiff issued a Bill asking for relief granted on the basis of a moral right overriding the strict legal code made the proceedings in their earlier stages very much more elastic, particularly when the Chancellor was a cleric and, doubtless, much influenced by considerations of civil and canon law. The Chancellor, however, in time developed its own technical procedure until, in the sixteenth century a compromise was reached ; estates in land without common

law title were recognized under trusts in equity and this doctrine spread to other property, and acted especially for the protection of married women and infants. The records in Chancery begin with the reign of Richard II, but it is not until the end of the fifteenth century that reports in Chancery cases appear. Thereafter, perhaps as the result of such reporting, they become almost as much wedded to precedent as the common law and, when the two were ultimately fused in 1873, there was no longer any considerable difference of doctrine.

In criminal causes, as regards historic procedure, the distinction which has been drawn between felonies and misdemeanours is of very ancient origin. Apart from Treason, Murder, Manslaughter, Burglary, Bigamy and Rape are all common law felonies. Forgery at Common Law was a misdemeanour, but now it is felony to forge certain public instruments, stock certificates and judicial records by virtue of various Forgery Acts, mostly of Victorian origin. The counterfeiting of the Great or Privy Seal, formerly treasons are now, by statute, felonies.

It has already been pointed out how conviction for felony formerly involved the forfeiture of goods and how, by the Forfeiture Act, 1870, all such forfeitures for treason or felony have been abolished. Felonies were punishable with death, with the exception of the felony of "petty larceny" when the thing stolen was not worth more than twelve pence. This exception dates from the time of the Saxons. In the eighteenth century 160 offences are mentioned by Blackstone as punishable with death, many of the then more recent being declared by statute to be "without benefit of clergy". This extraordinary archaism dates from the mediaeval separation of spiritual and lay persons in criminal causes. After 1300, however, the clerk, charged with felony, though ultimately handed over to the Bishop, was first tried in the secular court and his property confiscated as in the case of the punishment of a secular felon. The surrender to the Bishop thus applying only in felony was subsequently extended to all who could read a psalm. Murder cases were excepted

and under Tudor legislation the defence was only once allowed to be used. Benefit of clergy was finally abolished in 1827, by which time (in 1823) capital punishment had been reduced to about a hundred felonies and in 1861 limited to four. The pillory and whipping are now abolished as punishments.

It follows therefore that both forfeiture and capital sentence having been removed from most felonies, there are now no substantial differences between felony and misdemeanours left, save of a procedural kind and other matters affecting rights of arrest and other matters already mentioned; such as the case that in misdemeanour a man cannot be charged with being an accessory. Felons still suffer certain disqualifications for pension or office not involved in a conviction for a misdemeanour. The privilege of peerage, abolished in 1948, was confined to treason and felony. A misdemeanant at common law was entitled to bail if sufficient sureties were forthcoming but now, by statute, there is a discretion in the Justices, except in certain misdemeanours, where bail is compulsory on committal. Moreover, a trial for felony is always undertaken directly by the Crown, the issue being between "our Sovereign Lord the King and the prisoner at the Bar". Prosecutions for misdemeanours were formerly often brought on the information or complaint of private persons to the Crown. The trial is an "issue joined between our Sovereign Lord the King and the Defendant".

Indictments, however, are employed in both cases where there is a jury, and although now much simplified by the Indictments Act, 1915, they were formerly of great technicality and often resulted through incompetent drafting or error of fact in the acquittal of a guilty person.

At common law indictments had to have "precise and sufficient certainty"—in the margin the county where the offence was committed must be stated and the town or parish where the crime was committed and the day of its commission. By an Act of Henry V the full name of the accused had to be set out, and in certain crimes words of art had to be used, in treason the words "treasonably and against his allegiance", in murder the term "murdered" was to be used

and not "killed or slew", in burglary "burglariously", in rape "ravished", in larceny "feloniously took and carried away" and so forth. Moreover, the crime itself had to be exactly described, by what means and in what time and place it had been committed. Attempts at a reduction of this pedantry were made by many statutes in Victorian times, culminating in the Indictment Act, 1915.

Nevertheless, much learning devoted to the earlier problems, has helped, as in the analogous instance of ancient pleadings, to clarify the Law. When it is remembered that the criminal law in such important matters as murder has never been defined by statute and still depends upon such definitions as those of Coke, writing in the reign of James I, and that manslaughter similarly has only been defined by the Judges, we see how dependent we still are upon ancient authority, which can never properly be understood without a knowledge of the conditions of procedure obtaining at the time it was utilised.

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Although Jurists, as has been stated, have sought to distinguish between law as a matter of substance and its procedural provisions, it must be evident, when once the development of English jurisprudence is considered, that no such definite distinction can be made in our legal system. The very rights of action themselves have been largely dependent upon the forms of writ authorizing their prosecution; the constitutional guarantees of individual liberty are enshrined in statutes, such as the famous Petition of Right, the Habeas Corpus Acts, and the Bill of Rights, which deal largely with legal administration, with what is called adjectival law, rather than with such declaratory edicts as are to be found in foreign constitutions. The absence of any comprehensive codification of the law, the reliance upon precedent, the influence of historical and cultural influences have all made English Law very elastic in its formulation, but, at the same time, it must be confessed, very difficult for the layman to comprehend. Paradoxes confront the perplexed student at every turn. A jury, sometimes hailed as the palladium of liberty, was liable to censure or imprisonment

as late as Elizabethan times for returning a verdict inconvenient to the Government. As recently as the time of Charles II even a grand jury did not escape judicial condemnation for refusing to find a true bill.

The venerable institution of English Law resembles, it may be said, an ancient manorial house or cathedral, designed not on one plan, but containing wings, galleries, halls and corridors all of different ages and plan somehow marvellously blended into one architectural harmony. Primitive Teutonic custom, Norman centralized "bureaucracy", Christian canon and Roman civil law have all gone to provide the foundations of the juridical edifice. The interests of various ages; the prevention of sporadic violence in the earliest attempts at civilization, the concern in land holding in feudal times, the provision of laws to cope with the growing commercial needs of the later centuries, and finally the collectivist social aspirations of our own period, have all left their mark on this unique organic structure. Other countries have won pre-eminence in the arts, in philosophy and in science, but in the matter of the adjustment of personal relations to society, in the development of a working system of justice, no country has ever excelled this one, and from the English conception of jurisprudence, empirical as it may be, all the Anglo-Saxon communities have derived their basic principles and solved in part the intractable problem of the compromise between Liberty and Authority which is essential if a society is to endure and yet not become sterile.

At the same time, certain difficulties inherent in the English method cannot be overlooked. First, in a system of law largely dependent upon past decisions, the number of authorities, expanding yearly, may, by very bulk, in time become insupportable; for the number of reported cases in each decade run into many thousands. Secondly, with every refinement of principle and practice, the breach between the lawyer and the layman threatens to become more complete; to-day it is almost impossible for a subject to conduct any but the most simple of proceedings without legal assistance. Thirdly, the habit of the sovereign legislature to enact laws without any reference to existing juridical assumptions

places a great strain upon the coherence of the whole system. The almost total exclusion of trade unions from tortious liabilities under the Trade Disputes Act, 1906, is an example. When the powers to make law are vested in a Minister under sub-legislation, the variation between the common law and the governmental edict becomes even more marked; arbitrarily promulgated, such orders and regulations may become an increasing menace to the integrity of the law.

Assuming, as we well may, an increase in the operations of the State, it is still to be seen how far the venerable fabric of the law is competent to resist the new pressures from the Executive (though not the first it has experienced), or how it will modify its procedure and functions to cope with new problems. The recent parliamentary recognition that the old privilege from suit of the Crown in Tort can no longer be defended is certainly a concession in favour of the preservation of the Common Law; it may be that the national genius for accommodation of new demands to old expedients may still save the essential qualities of the judicial system. In such a spirit Lord Mansfield incorporated the Law of Merchants into the common law system in a then new commercial age, and great jurists may yet arise to perform the same compromise for that collectivist society which is now demanding legal recognition and control.

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